

United States
Circuit Court of Appeals
For the Ninth Circuit.

MASICK C. MAGARIAN,

Appellant,

vs.

DETROIT PRODUCTS COMPANY, a copartner-
ship composed of FLOYD E. WALLACE and
PERCY J. ELWELL,

Appellees.

Transcript of Record
In Two Volumes


VOLUME I

Pages 1 to 261

Upon Appeal from the District Court of the United
States for the Northern District of California,
Southern Division.

OCT 28 1941

PAUL P. O'BRIEN,
CLERK



Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

United States
Circuit Court of Appeals

For the Ninth Circuit.

MASICK C. MAGARIAN,

Appellant,

vs.

DETROIT PRODUCTS COMPANY, a copartner-
ship composed of FLOYD E. WALLACE and
PERCY J. ELWELL,

Appellees.

Transcript of Record

In Two Volumes

VOLUME I

Pages 1 to 261

Upon Appeal from the District Court of the United
States for the Northern District of California,
Southern Division.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

| | Page |
|--|------|
| Answer, Amended | 4 |
| Appeal: | |
| Bond on | 25 |
| Designation of Contents of Record on (Appellant's) | 255 |
| Designation of Contents of Record on (Appellant's Supplementary) | 260 |
| Designation of Contents of Record on (Appellee's) | 257 |
| Notice of | 24 |
| Statement of Points on (Circuit Court of Appeals) | 254 |
| Statement of Points on (District Court)..... | 27 |
| Attorneys of Record, Names and Addresses of... | 1 |
| Bond on appeal | 25 |
| Certificate of Clerk to Transcript of Record..... | 32 |
| Complaint | 2 |
| Conclusions of law | 21 |
| Designation of Contents of Record on Appeal (Appellant's) | 255 |

| Index | Page |
|--|------|
| Designation of Contents of Record on Appeal (Appellee's) | 257 |
| Designation of Contents of Record on Appeal (Appellant's Supplementary) | 260 |
| Findings of fact and conclusions of law | 16 |
| Judgment | 22 |
| Names and Addresses of Attorneys of Record..... | 1 |
| Notice of Appeal | 24 |
| Order for Judgment | 15 |
| Order relating to pre-trial conference | 12 |
| Order relating to transferring of exhibits | 31 |
| Reporter's Transcript (See "Testimony")..... | 33 |
| Statement of Points (Circuit Court of Ap- peals) | 254 |
| Statement of Points (District Court) | 27 |
| Statement of prior patents | 14 |
| Testimony | 33 |
| Exhibits for defendant: | |
| E—Invoice of Detroit Products Com- pany dated May 10, 1933 | 275 |
| F—Invoice of Detroit Products Com- pany dated January 26, 1934 | 276 |
| G—Check in the amount of \$36.10 pay- able to F. Wallace signed by F. E. Smith | 277 |

| Index | Page |
|---|------|
| Exhibits for defendant (Cont.): | |
| J—Check in the amount of \$6.10 payable to F. Wallace signed by C. L. Armstrong | 278 |
| K—Checkbook stub of Defendant's Exhibit J | 279 |
| L—Answer to Question No. 27 of Interrogatories | 280 |
| U—Book of Patents | 282 |
| Elliott Patent No. 1,415,817 | 283 |
| Kimbrough Patent No. 1,600,887... .. | 287 |
| Stimson Patent No. 1,807,350 | 292 |
| Costenbader Patent No. 1,673,865... .. | 298 |
| Reynolds Patent No. 1,873,033 | 302 |
| Carter Patent No. 1,659,082 | 307 |
| Miller Patent No. 1,860,719 | 311 |
| Dennis (Br.) Patent No. 341,652... .. | 316 |
| Exhibits for plaintiff: | |
| H—Magarian Patent No. 2,153,634 | 263 |
| I—Magarian Design Patent No. 109,-148 | 267 |
| K—Blueprint of Special Lens (Stimsonite) | 270 |
| O—Blueprint of X Lens (Medium Ruby Glass) | 271 |

| Index | Page |
|--|------|
| Exhibits for plaintiff (Cont.): | |
| W—Letter dated December 4, 1936 to Industrial Scientific Company from The Department of Motor Vehicles, State of California | 272 |
| Y—Sketch of Signal Arm handle drawn by Masick C. Margarian | 274 |
| Witnesses for defendant: | |
| Armstrong, Cecil L. | |
| —direct | 199 |
| —cross | 204 |
| Mitchell, Thomas A. | |
| —direct | 161 |
| —cross | 178 |
| Smith, H. E. (Deposition) | |
| —direct | 191 |
| Smith, L. E. (Deposition) | |
| —direct | 182 |
| —cross | 189 |
| —redirect | 191 |
| Wallace, Floyd E. | |
| —direct | 206 |
| —cross | 226 |
| —recalled, direct | 252 |
| Witnesses for plaintiff: | |
| Lynn, Wallace R. (Deposition) | |
| —direct | 114 |
| —cross | 127 |

Index

Page

Witnesses for plaintiff (Cont.):

Lynn, Wallace R. (Testimony)

—direct 141

—cross 152

Magarian, Masick C.

—direct 33

—cross 70

—recalled, direct 159

—recalled, direct 237

—cross 240

NAMES AND ADDRESSES OF
ATTORNEYS OF RECORD

ADELBERT SCHAPP, Esq.,
510 Hobart Building,
San Francisco, California
Attorney for plaintiff and appellant

JAS. M. NAYLOR, Esq.,
1258 Russ Building,
San Francisco, California
Attorney for defendants and appellees

FRED H. MILLER, Esq.,
706 Central Building,
Los Angeles, California
Of Counsel

In the District Court of the United States, in and
for the Northern District of California, South-
ern Division.

Civil Action File Number 21306S

MASICK C. MAGARIAN,

Plaintiff,

vs.

DETROIT PRODUCTS COMPANY, a copartner-
ship, composed of FLOYD E. WALLACE and
PERCY J. ELWELL,

Defendants.

COMPLAINT

[1*]

Now comes the Plaintiff in the above-entitled
action, and alleges:

1. Plaintiff is a citizen of the United States, and
a resident of Fresno, in the County of Fresno, and
State of California.

2. Defendant, on information and belief, is a
copartnership composed of Floyd E. Wallace and
Percy J. Elwell, having its principal place of busi-
ness in the Town of El Segundo, County of Los
Angeles, and State of California, and having a
regular and established place of business in the City
and County of San Francisco, and State of Cali-
fornia, at 537 Turk Street; the acts of infringe-
ment hereinafter complained of have taken place

*Page numbering appearing at foot of page of original certified
Transcript of Record.

in said City and County of San Francisco, State of California and elsewhere.

3. This Honorable Court has jurisdiction of this cause of action because it arises under the patent laws of the United States.

4. On April 5th, 1938, United States Design Letters Patent No. D. 109,148 were duly and legally issued to Plaintiff for an invention in a Signal Arm; and since that time Plaintiff has been and still is the owner of those Letters Patent.

5. On April 11th, 1939, United States Letters Patent No. 2,153,634 were duly and legally issued to Plaintiff for an invention in a Signal Arm; and since that date Plaintiff has been and still is the owner of those Letters Patent. [2]

6. Defendant has for a long time past been and still is infringing both of those Letters Patent by making, selling and using, within the City and County of San Francisco, and elsewhere, signal arms embodying the said patented inventions, and will continue to do so unless enjoined by this Court.

7. Plaintiff has placed the required statutory notice on signal arms manufactured and sold by him under said letters patent, and has given written notice to Defendant of his said infringement.

Wherefore Plaintiff demands a preliminary and final injunction against further infringement by Defendant and those controlled by Defendant, an

accounting for profits and damages, and an assessment of costs against Defendant.

MASICK C. MAGARIAN

Plaintiff

A. SCHAPP,

Counsel for Plaintiff.

[Endorsed]: Filed Aug. 18, 1939. [3]

[Title of District Court and Cause.]

AMENDED ANSWER

Now come the defendants in the above-entitled action and answer the Bill of Complaint as follows:

1.

Defendants have no knowledge of the citizenship of the plaintiff, but for the purpose of this action admit that he is a citizen of the United States and a resident of [4] Fresno, in the County of Fresno, State of California.

2.

The defendants admit that Floyd E. Wallace and Percy J. Elwell are copartners doing business under the name and style of Detroit Products Company, and that their principal place of business is in the town of El Segundo, County of Los Angeles, State of California, but deny that they, or either of them, have a regular and established place of business in the City and County of San Francisco at 537 Turk Street, or at any other place within the Northern District of California; deny that they have com-

mitted any acts of infringement, and deny that any alleged acts of infringement complained of in the Bill of Complaint have taken place either in the City and County of San Francisco, or elsewhere within the Northern District of California.

3.

Defendants admit that the alleged cause of action arises under the patent laws of the United States, but deny that this court has jurisdiction for the reasons that the defendants do not reside in the Northern District of California, nor do they have a regular and established place of business within the Northern District of California, nor have they committed any acts of infringement within the Northern District of California.

4.

Defendants admit that on April 5, 1938, Design Letters Patent No. D109,148, were issued to plaintiff, but deny that the same were duly and legally issued. As to the allegation that the plaintiff has been and still is the owner of said letters patent, the defendants are without knowledge and therefore deny that the plaintiff has been and still is the owner thereof.

5.

Defendants admit that on April 11, 1939, United States [5] Letters Patent No. 2,153,634, were issued to plaintiff for a Signal Arm, but deny that the same were duly and legally issued. As to the allegation that plaintiff has been and still is the owner

of said letters patent, the defendants are without knowledge and therefore deny that the plaintiff has been and still is the owner thereof.

6.

Defendants deny that they have been for a long time past, or at any time, and deny that they now are infringing either or both of said letters patent either by making, selling, or using within the City and County of San Francisco, or elsewhere, signal arms embodying either of the alleged patented inventions, and deny that they will continue to do so unless enjoined by this court.

7.

Defendants are without knowledge as to whether the plaintiff has placed the required statutory notice on signal arms manufactured and sold by him, and therefore deny this allegation of the Bill of Complaint. Defendants admit that they have received written notice alleging that the defendants were guilty of infringement.

A. As a first affirmative defense, defendants allege, upon information and belief, that both of said letters patent are invalid and void for the reason that the subject matter thereof does not amount to invention, but instead amounts to mere mechanical skill.

B. Defendants allege, upon information and belief, that said Letters Patent No. 2,153,634 are invalid and void for the reason that the claims thereof

are not for good and valid patentable combinations, but instead are for mere unpatentable aggregations.

[6]

C. Defendants allege, upon information and belief, that both letters patent in suit are invalid and void for the reason that the subject matter thereof has been constructively abandoned by the plaintiff in that the plaintiff sold and publicly used devices embodying the alleged inventions thereof more than two years prior to the filing of the applications for said letters patent.

D. Defendants allege, upon information and belief, that both letters patent in suit are invalid and void for the reason that devices embodying the alleged inventions thereof were sold and publicly used by the following persons or concerns at the following places prior to the plaintiff's alleged invention thereof, or more than two years prior to the filing of the plaintiff's applications for United States Letters Patent thereon:

Sold by Industrial Scientific Company, address P. O. Box 494, Fresno, California; place of sale Fresno, California.

Sold by Reliable Automotive Company, address Fresno, California; place of sale, Fresno, California.

Use by Reliable Automotive Company, address Fresno, California; place of use, Fresno, California.

Use by American Transfer Company, address Fresno, California; place of use, Fresno, California.

Sold and used by Detroit Products Company, address El Segundo, California; place of sale and use 301 El Segundo Boulevard, El Segundo, California.

and others of which the names and addresses and places of sale and use defendants are not now advised but for which they are making diligent inquiry and pray leave to insert herein by amendment when ascertained.

E. Defendants allege, upon information and belief, that Letters Patent No. D-109,148 and 2,153,634, are invalid and void [7] for the reason that each and every material part thereof was patented or described in the following patents and publications:

| Patent No. | Patentee | Date |
|------------|-------------|-------------------|
| 1,600,887 | Kimbrough | Sept. 21, 1926 |
| 1,675,431 | Sharp | July 3, 1928 |
| 2,079,408 | Hosker | May 4, 1937 |
| 1,807,350 | Stimson | May 26, 1931 |
| 1,415,817 | Elliott | May 9, 1922 |
| 1,673,865 | Costenbader | June 19, 1928 |
| 1,847,070 | Cunard | March 1, 1932 |
| 1,873,033 | Reynolds | August 23, 1932 |
| 1,233,203 | Ducas | July 10, 1917 |
| 1,563,790 | Reid | December 1, 1925 |
| 1,659,082 | Carter | February 14, 1928 |
| 2,099,671 | Bairey | November 23, 1937 |
| 340,490 | Cummings | April 20, 1886 |
| 504,890 | Ohmart | Sept. 12, 1893 |
| 1,821,227 | Mackey | Sept. 1, 1931 |
| 1,860,719 | Miller | May 31, 1932 |
| 2,050,779 | Blanchard | August 11, 1936 |
| 1,689,786 | Koenigsberg | October 30, 1928 |
| 1,881,274 | Mamiya | November 20, 1934 |
| 1,366,317 | Gorny | January 18, 1921 |

| Patent No. | Patentee | Date |
|------------|----------|-------------------|
| 1,875,418 | Ciurana | September 6, 1932 |
| 1,308,284 | Hoyt | July 1, 1919 |
| 2,112,526 | Graham | March 29, 1938 |
| 1,744,794 | Pohlmann | January 28, 1930 |

British Patents

| | | |
|---------|--------|--------------------|
| 152,071 | Corber | September 28, 1930 |
| 341,652 | Dennis | January 22, 1931 |

and others, the numbers and dates of which and other identifying media being now unknown to the defendants and for which the defendants are conducting a diligent search and pray leave to insert herein by amendment when ascertained.

F. Defendants allege, upon information and belief, that the letters patent in suit are invalid and void for the reason that the same were obtained upon an application founded by a false oath executed by the plaintiff setting forth that the alleged inventions thereof had not been in public use or on sale in this country for more than two years prior to the filing of the applications for United States Letters Patent thereon whereas the plaintiff knew at the time that said oath was executed that this statement was untrue as the plaintiff himself had sold or [8] had caused to be sold devices embodying the alleged inventions thereof more than two years prior to the filing of his applications for said letters patent.

G. Defendants allege, upon information and belief, that the plaintiff is guilty of unclean hands in respect to the following:

(1) That the plaintiff has sought to suppress and conceal evidence to the effect that devices embodying the alleged inventions of said letters patent were on sale and sold and publicly used within the United States more than two years prior to the filing of his applications for the letters patent in suit, and in so doing, executed a false oath as part of said applications denying that the alleged inventions thereof had been in public use or on sale in this country for more than two years prior to the filing of his applications.

(2) That the plaintiff in marketing his own signal arms and seeking to deprive these defendants of legitimate business and trade representing to the public that the plaintiff's signal arms were patented and protected by patents bearing the following numbers:

| | | |
|-----------|-----------|-----------|
| 1,591,572 | 1,807,350 | 1,906,955 |
| 1,671,086 | 1,848,675 | |
| 1,743,834 | 1,895,173 | |

by applying a plate to the arm bearing these numbers in such a position as to create the impression that these numbers of patents applied to or related to the entire signal arm, whereas in fact the letters patent having these numbers do not belong to the plaintiff but instead belong to J. C. Stimson of St. Louis, Missouri, and instead of relating to the construction of the signal arm relate to the means and method of making the reflectors or lenses used in the plaintiff's signal

arms and to the construction of the lenses themselves that plaintiff purchased [9] from J. C. Stimson, or his concern, and incorporated in the construction of the plaintiff's signal arms.

H. The defendants further allege, upon information and belief, that the plaintiff herein during the prosecution of his alleged application that matured into United States Letters Patent No. 2,153,634, presented certain claims which were rejected by the Examiner, that the Examiner's rejection was acquiesced in by the plaintiff or the attorneys acting on the plaintiff's behalf by the cancellation of certain of the rejected claims, and the amendment to others so that the plaintiff herein is now estopped to urge a construction of the granted claims which would be broad enough to cover the construction alleged by the plaintiff to infringe, or to urge that the granted claims be construed to cover a construction covered by the presented claims prior to their cancellation or amendment. The defendants further allege that by reason of the cancellation of the rejected claims in the application that matured into United States Letters Patent No. 2,153,634, that the plaintiff is estopped to urge that the plaintiff's Design Letters Patent should be construed as being broad enough to cover any construction manufactured and/or sold by these defendants.

I. Defendants further allege upon information and belief, that the claims in United States Letters Patent No. 2, 153,634 are invalid and void in that

incorporated therein is "new matter" or matter not disclosed in the application resulting in said letters patent as the application was originally filed; that said new matter was introduced during the prosecution of the application in opposition to established rules in the Patent Office and that said claims were therefore illegally granted, as the new matter was improper in the first instance and unsupported by any supplemental oath as required by the Patent Office Rules [10] in the second instance.

Wherefore, the defendants pray that the Bill of Complaint herein be dismissed and that they be awarded their taxable costs.

JAS. M. NAYLOR,

Attorney for Defendants.

Dated May 1, 1940.

(Receipt of Service.)

[Endorsed]: Filed May 6, 1940. [11]

[Title of District Court and Cause.]

ORDER RELATIVE TO PRE-TRIAL
CONFERENCE

The above-entitled cause having come on regularly for pre-trial conference, under Rule 16 of the Federal Rules of Civil Procedure, on Monday, July 22, 1940, the plaintiff herein being represented by Adelbert Schapp and defendants having been rep-

resented by Jas. M. Naylor, and upon representations and stipulations of said counsel,

It is hereby ordered:

1. The defendants herein shall have the right to produce evidence on the question of whether the Court has jurisdiction.

2. Plaintiff has title to the patents in suit, as admitted by defendants' counsel.

3. That defendants herein reduce the number of prior patents to be relied upon at the trial from the number listed in paragraph 7 (e) of the answer on file herein to a maximum of ten (10) and within five days from date hereof file with the Court and serve upon plaintiff's counsel a designation of the patents to be relied upon.

4. Notwithstanding item 3 hereof defendants shall have the right to introduce into evidence file histories of plaintiff's patents and copies of the prior patents cited therein by the Patent Office Examiner.

5. Neither of the parties herein shall call a patent expert as a witness.

6. Defendants admit the manufacture and sale of the signal arms offered as plaintiff's Exhibits D and E, on the [12] deposition of Wallace R. Lynn herein.

7. Defendants admit the sale of plaintiff's Exhibit D by T. A. Mitchell to Birkelund Hansen, with-

out waiving defendants' challenge of jurisdiction.

Dated: July 26, 1940.

A. F. ST. SURE,

Judge of the United States District Court.

Approved as to form:

A. SCHAPP,

Attorney for Plaintiff.

F. H. MILLER,

JAS. M. NAYLOR,

Attorneys for Defendants.

(Receipt of Service)

[Endorsed]: Filed July 26, 1940. [13]

[Title of District Court and Cause.]

STATEMENT OF PRIOR PATENTS THAT DEFENDANTS WILL SPECIFICALLY RELY UPON AT THE TIME OF TRIAL.

The following prior patents will be relied upon [14] specifically by the defendants at the time of trial:

| Patentee | Number | Issued |
|-------------|-----------|----------------|
| Kimbrough | 1,600,887 | Sept. 21, 1926 |
| Stimson | 1,807,350 | May 26, 1931 |
| Elliott | 1,415,817 | May 9, 1922 |
| Costenbader | 1,673,865 | June 19, 1928 |
| Reynolds | 1,873,033 | Aug. 23, 1932 |
| Carter | 1,659,082 | Feb. 14, 1928 |
| Miller | 1,860,719 | May 31, 1932 |

British Patent to Dennis 341,652, accepted January 22, 1931.

JAS. M. NAYLOR,
Counsel for Defendants.

July 25, 1940.

(Receipt of Service)

[Endorsed]: Filed July 27, 1940. [15]

[Title of District Court and Cause.]

ORDER FOR JUDGMENT ON
FINDINGS, ETC.

1. Defendants' motion to dismiss for lack of jurisdiction is denied.

2. Plaintiff's motion to add T. A. Mitchell as a party defendant is denied.

3. I find that plaintiff's patent No. 2,153,634 for a signaling arm, issued on April 11, 1939, is invalid for lack of invention.

4. I find that plaintiff's design patent No. 109,148, issued on April 5, 1938, is invalid for lack of invention.

It is therefore ordered that plaintiff take nothing by his suit, and that the complaint be and the same is hereby dismissed with judgment to defendants for their costs.

Counsel for defendants may submit findings of fact and conclusions of law.

Dated: February 13, 1941.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed Feb. 13, 1941. [16]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to the Order for Judgment on Findings, etc., entered herein on February 13, 1941, the following findings of fact and conclusions of law are submitted by counsel for the defendants for approval and adoption by the Court.

FINDINGS OF FACT

1.

The plaintiff, Masick C. Magarian, is a citizen of the United States and a resident of Fresno, California, and is the owner of United States Letters Patent No. 2,153,634, issued April 11, 1939, and the owner of United States Design Letters Patent No. D-109,148, issued April 5, 1938.

2.

The defendants, Floyd E. Wallace and Percy J. Elwell, are residents of El Segundo in the County of Los Angeles, State of California, and jointly do business under the name and style of Detroit Products Company.

3.

T. A. Mitchell resides at San Francisco, California, and does business under the name and style of T. A. Mitchell Company at 537 Turk Street, San Francisco, California.

4.

The defendants, Floyd E. Wallace and Percy J. Elwell, maintain a small supply of signal arms alleged to infringe the plaintiff's patents at the place of business of T. A. Mitchell, Myron Mitchell, who is employed by T. A. Mitchell Company, solicits orders from retailers throughout the Northern District [17] of California for signal arms manufactured by the defendants, which orders if large, are referred to the defendants at El Segundo for acceptance. Such orders are filled at El Segundo, delivery being made from El Segundo and collections effected by the defendants. In the case of small orders these are filled from the supply of allegedly infringing signal arms kept at T. A. Mitchell Company in San Francisco, California.

5.

The defendants manufactured and sold a signal arm as illustrated in Defendants' Exhibit A. in California during the year 1927 and during later years.

6.

The defendants manufactured and sold in the State of California signal arms exemplified by Defendants' Exhibit D from 1931 to 1935. On or about April 7, 1932, the defendants manufactured and sold in the State of California signal arms exemplified by Defendants' Exhibit I.

7.

More than two years prior to the filing of the plaintiff's application for United States Letters Pat-

ent, i. e. November 16, 1937, the plaintiff himself manufactured and publicly sold a signal arm exemplified by Plaintiff's Exhibit A.

8.

Prior patents having a pertinent bearing on the question of novelty and invention of the plaintiff's patents include

| | | |
|-----------|-----------|-----------------------|
| Elliott | 1,415,817 | issued May 9, 1922 |
| Kimbrough | 1,600,887 | issued Sept. 21, 1926 |
| Stimson | 1,807,350 | issued May 26, 1931 |

[18]

| | | |
|-------------|-----------|--------------------------|
| Costenbader | 1,673,865 | issued June 19, 1928 |
| Reynolds | 1,873,033 | issued August 23, 1932 |
| Carter | 1,659,082 | issued February 14, 1932 |

and the British Patent to Dennis No. 341,652, issued Jan. 22, 1931.

9.

It was not new at the time of the plaintiff's alleged invention to manufacture signal arms having two identical elongated plates having registering marginal flanges and spaced body portions with registering openings therein, this feature being illustrated in plaintiff's Exhibit A and in the Elliott patent.

10.

It was not new at the time of the plaintiff's alleged invention to manufacture signal arms with lenses having flanges bearing upon the inner margins of the openings and having body portions projecting through the openings in the plates, this being illustrated in plaintiff's Exhibit A.

11.

It was not new at the time of the plaintiff's alleged invention to manufacture signal arms with separators between the lenses or to secure the flanges of the plates together to cause the plates to clamp the lenses upon the separator, this being shown to be old in plaintiff's Exhibit A.

12.

It was not new at the time of the plaintiff's alleged invention to have the lenses of signal arms having shaped inner faces to produce desire reflecting effects or to have the separator preventing play between the lenses and plates, such shaped lenses being illustrated in plaintiff's Exhibit A and the [19] utilization of the separator to prevent play being illustrated in plaintiff's Exhibit A.

13.

It was not new at the time of the alleged invention of plaintiff's Design Letters Patent to have a signal arm composed of identical elongated plates having raised center portions and marginal flanges with reflectors mounted in a row along the length of the raised center portions, these being shown to be old in defendant's Exhibit D.

14.

It was not new at the time of the alleged invention of plaintiff's Design Letters Patent to use elongated lenses or reflectors on signal arms, such being shown to be old in the Costenbader patent.

15.

The use of a plurality of reflecting lenses in a row on the sides of a vehicle signal arm and the use of elongated lenses for this purpose at the time of the plaintiff's alleged inventions was a mere matter of selection or option not amounting to invention, but instead mere mechanical skill.

16.

The use of a single separator between the lenses arranged in rows in opposite sides of the signal arm and the making of this separator so as to be coextensive with the lense receiving space provided by the plates of the signal arm at the time of the plaintiff's alleged invention did not amount to invention but to mere mechanical skill.

17.

During trial of this action claim 2 of the plaintiff's patent No. 2,153,634 was voluntarily withdrawn from issue by [20] plaintiff's counsel.

18.

During trial of this action plaintiff moved to have T. A. Mitchell made a party-defendant at the time T. A. Mitchell took the witness stand for purposes of testifying as a witness on behalf of the defendants.

CONCLUSIONS OF LAW

Wherefore, it is concluded

1.

This Court has jurisdiction as to the suit is based upon the alleged infringement by the defendants of the plaintiff's Letters Patent and the defendants maintain a regular and established place of business at the offices of T. A. Mitchell Company in the Northern District of California.

2.

Plaintiff's motion to add T. A. Mitchell as a party-defendant is untimely and should be denied.

3.

Claim 1, 3 and 4 of the plaintiff's patent No. 2,153,634, issued April 11, 1939, are invalid for lack of invention over the prior art.

4.

Plaintiff's Design Letters Patent No. D-109,148 is invalid for lack of invention over the prior art.

5.

The Bill of Complaint herein should be dismissed with judgment to the defendants for their costs.

[21]

FRED H. MILLER,

JAS. M. NAYLOR,

Counsel for Defendants.

Approved as to form under Rule 22:

A. SCHAPP,

Attorney for Plaintiff.

The foregoing Findings of Fact and Conclusions of Law are hereby adopted and approved.

Dated: This 13th day of March, 1941.

A. F. ST. SURE,

United States District Judge.

(Receipt of Service)

[Endorsed]: Filed Mar. 13, 1941. [22]

In the United States District Court in and for the
Northern District of California,
Southern Division

Civil Action No. 21306S

MASICK C. MAGARIAN,

Plaintiff,

v.

DETROIT PRODUCTS COMPANY, a copartner-
ship, composed of FLOYD E. WALLACE and
PERCY J. ELWELL,

Defendants.

FINAL JUDGMENT

This Cause having come on to be heard before this Court and having been fully tried upon testimony offered in open court and on depositions previously taken and offered in evidence therein, and the plaintiff and the defendants by their respective counsel having thereafter submitted briefs and the cause

having been submitted to the Court and the same having been duly considered [23]

It Is Hereby Ordered, Adjudged, and Decreed

1.

That this Court has jurisdiction of the case under the Patent Laws of the United States.

2.

That plaintiff's patent No. 2,153,634, issued April 11, 1939 is invalid in law as to claims 1, 3, and 4 thereof for lack of invention.

3.

That plaintiff's Design Letters Patent No. D-109,148, issued April 5, 1938, is invalid in law for lack of invention.

4.

That the plaintiff's Bill of Complaint stand dismissed with prejudice.

5.

That the defendants be awarded their taxable costs in the sum ofDollars (\$142.54) to be taxed including the reporter's fees charged for taking the testimony in open court and in the depositions and the cost of transcribing the original copy thereof, and that the defendants have execution therefor against the plaintiff.

Dated: This 13th day of March, 1941.

A. F. ST. SURE,

United States District Judge.

Approved as to form:

A. SCHAPP,

Attorney for Plaintiff.

(Receipt of Service)

March 7/1941.

[Endorsed]: Filed Mar. 13, 1941. [24]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS. [25]

Notice Is Hereby Given that Masick G. Magarian, the Plaintiff above-named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the following parts of the Final Judgment entered in this action on the 13th day of March, 1941, to wit:

That Plaintiff's Patent No. 2,153,634, issued April 11, 1939, is invalid in law as to Claims 1, 3 and 4 thereof for lack of invention;

That Plaintiff's Design Letters Patent, No. D-109,148, issued April 5, 1938, is invalid in law for lack of invention;

That the Plaintiff's Bill of Complaint stand dismissed with prejudice.

That the Defendants be awarded their taxable costs in the sum of \$142.54 to be taxed including the

reporter's fees charged for taking the testimony in open court and in the depositions and the cost of transcribing the original copy thereof, and that the Defendants have execution thereof against the Plaintiff.

Signed

A. SCHAPP,
ADELBERT SCHAPP,
Attorney for Appellant,
Masick C. Magarian,
510 Hobart Building,
San Francisco, California.

[Endorsed]: Filed Mar. 27, 1941. [26]

The premium on this bond is \$10.00 per annum.

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Whereas, Masick C. Magarian, has appealed or is about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit from a certain judgment rendered against said Masick C. Magarian in said action in the above entitled court and in favor of Detroit Products Company, a copartnership, composed of Floyd E. Wallace and Percy J. Elwell, and entered herein on March 13, 1941.

Now, Therefore, in consideration of the premises and of such appeal, the undersigned Maryland Casualty Company, a corporation organized and existing under the laws of the State of Maryland and duly authorized to transact a general surety busi-

ness in the State of California, does hereby undertake and promise on the part of Masick C. Magarian, the Appellant, that said Appellant will pay all damages and costs which may be awarded against him on the appeal, or on a dismissal thereof, not exceeding Two Hundred Fifty Dollars (\$250.00), to which amount it acknowledges itself bound.

It is further stipulated as a part of the foregoing bond that in case of the breach of any condition thereof, the above named District Court, may upon ten (10) days notice to the surety above named, proceed summarily in said proceedings to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against said surety and award execution therefor, not exceeding, however, the said sum of Two Hundred Fifty Dollars (\$250.00).

In Witness Whereof, the said surety has caused these presents to be executed and its official seal attached by its [27] duly authorized Attorney-in-fact at San Francisco, California, the 27th day of March, 1941.

[Seal]

MARYLAND CASUALTY
COMPANY,

By DONALD MOLLBERG,

Attorney-in-fact.

State of California,

City and County of San Francisco—ss.

On this 27th day of March in the year one thousand nine hundred and forty-one before me, Emily

K. McCorry, a Notary Public in and for the City and County of San Francisco, personally appeared Donald Mollberg, known to me to be the Attorney-in-fact of the Maryland Casualty Company, the corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and he acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal at my Office in the City and County of San Francisco the day and year in this Certificate first above written.

EMILY K. McCORRY,

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires December 30, 1942.

[Endorsed]: Filed Mar. 27, 1941. [28]

[Title of District Court and Cause.]

STATEMENT OF POINTS [29]

Now Comes the Plaintiff and Appellant in the above-entitled action, and files herewith his statement of the points on which he intends to rely on the appeal, as follows:

That the Court erred:

1. In not holding Claims 1, 3 and 4 of the Plaintiff's Patent No. 2,153,635, valid and infringed by

the Defendants' signalling arms, Plaintiff's Exhibits D and E;

2. In not holding the Plaintiff's Design Patent No. D-109,148, valid and infringed by the Defendant's Signalling Arms, Plaintiff's Exhibits D and E;

3. In holding that "signal arms having two identical elongated plates having registering marginal flanges and spaced body portions with registering openings therein", were disclosed in Plaintiff's Exhibit A and in the Elliot Patent;

4. In holding that it was not new at the time of the Plaintiff's alleged invention to manufacture signal arms "with lenses having flanges bearing upon the inner margins of the openings and having body portions projecting through the openings in the plates", on the ground of such feature being illustrated in Plaintiff's Exhibit A;

5. In holding that it was not new at the time of the Plaintiff's alleged invention to manufacture "signal arms with separators between the lenses or to secure the flanges of the plates together to cause the plates to clamp the lenses upon the separator", on the ground of this feature being shown to be old in Plaintiff's Exhibit A; [30]

6. In holding that it was not new at the time of the Plaintiff's alleged invention to have the lenses of signal arms having "shaped inner faces to produce desired reflecting effects, or to have the separator preventing play between the lenses and plates", on the ground of such shaped lenses being

illustrated in Plaintiff's Exhibit A and the utilization of the separator to prevent play being illustrated in Plaintiff's Exhibit A.

7. In holding that it was not new at the time of the alleged invention of Plaintiff's Design letters patent to have "a signal arm composed of identical elongated plates having raised center portions and marginal flanges with reflectors mounted in a row along the length of the raised center portions", on the ground of these being shown to be old in Defendants' Exhibit D;

8. In holding that it was not new at the time of the alleged invention of Plaintiff's Design letter patent to use "elongated lenses or reflectors on signal arms" on the ground of such being shown to be old in the Costenbader Patent.

9. In holding that the use of a plurality of reflecting lenses in a row on the sides of a vehicle signal arm and the use of elongated lenses for this purpose at the time of the Plaintiff's alleged inventions was a mere matter of selection or option not amounting to invention, but instead mere mechanical skill;

10. In holding that the use of a single separator between the lenses arranged in rows in opposite sides of the signal arm, and the making of this separator so as to be co-extensive with the lens-receiving space provided by the plates of the signal arm at the time of the Plaintiff's alleged invention did not amount to invention but to mere mechanical skill. [31]

11. In failing to recognize that each of the claims in issue defines a combination of different elements, and that such combination may be new and patentable, even though all the elements be proven to be old;

12. In failing to recognize that a design patent is to be judged by the overall esthetic effect and ornamental appearance of the patented device, and cannot be defeated by a mere showing of mechanical arrangements in the prior art;

13. In failing to make any finding with respect to Plaintiff's reduction to practice, and the number of Plaintiff's devices made under the patent, and distributed throughout the Western States before the Defendants began to manufacture the accused devices;

14. In failing to give any consideration to the commercial success of Plaintiff's signalling arm;

15. In failing to apply the rule that the adoption of the patented construction by a Defendant in preference to all the prior art, indicates invention;

16. In failing to apply the principle that the citation of a large multiplicity of references in itself is evidence of invention;

17. In according to the Defendants the status of a pioneer in the art, although signalling arms were patented a long time before the Defendants entered upon the manufacture of such arms, and although the State of California had passed a law with respect to signalling arms several years before that time; [32]

18. In not giving Plaintiff the status of a pioneer although he was the first one to introduce the use of a Stimsonite reflector lens into the signalling arm industry.

19. In not giving any weight to the maxim of the Law that a patent carries the presumption of validity.

20. In dismissing the Bill of Complaint herein with Judgment to the Defendants for their costs.

A SCHAPP,

Counsel for Plaintiff and
Appellant.

Dated: April 9th, 1941.

Receipt of a copy of the above Statement of Points is hereby admitted this 11th day of April, 1941.

NAYLOR,

Counsel for Defendants and
Appellees.

[Endorsed]: Filed April 15, 1941. [33]

[Title of District Court and Cause.]

ORDER

Good Cause appearing therefor, it is hereby Ordered that the originals of the Depositions on file herein and of the Reporter's Transcript and all original exhibits introduced at the Trial of this

Cause, be forwarded to the Circuit Court of Appeals of the Ninth Circuit.

A. F. ST. SURE

United States District Judge

Dated: April 16, 1941.

[Endorsed: Filed Apr. 16, 1941. [34]]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 37 pages, numbered from 1 to 37, inclusive, contain a full, true, and correct transcript of the records and proceedings in the Case of Masick C. Magarian vs. Detroit Products Company, etc., et al., No. 21306-S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Six and 35/100 Dollars (\$6.35) and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San

Francisco, California, this 25th day of April A. D.
1941.

[Seal]

WALTER B. MALING,

Clerk.

C. C. EVENSEN.

Deputy Clerk. [38]

[Title of District Court and Cause.]

TESTIMONY

Thursday, August 1, 1940

and

Friday, August 2, 1940

Counsel Appearing:

For Plaintiff:

Adelbert Schapp, Esq.

For Defendants:

Jas. M. Naylor, Esq.,

Fred H. Miller, of Counsel. [39]

MASICK C. MAGARIAN,

Called as a witness on his own behalf, after being
first duly sworn, testified as follows:

Mr. Schapp: Q. Will you give your name in
full? A. Masick C. Magarian.

Q. And your age?

A. Forty-two in October.

Q. Where do you live?

[Testimony of Masick Magarian.]

A. I live in Fresno, California.

Q. What is your occupation?

A. Manufacturing metal products, signal arms, and other metal products.

Q. Do you do business there under your own name?

A. It is under Industrial Scientific Company.

Q. And where is your business located?

A. In Fresno, California.

Q. When did you commence doing business in that location?

A. I started business about in April or May, 1935.

Q. Will you give the Court a general explanation of the nature of the business—as to what you are doing?

A. Well, our main line is the manufacturing of signalling arms, and in addition to that, we are manufacturing parts for other companies. We make tools, and dies for other concerns, and also manufacture the parts for them.

Q. How big a part of your general business is taken up by the manufacture and sale of the signal arm?

A. I would say a larger portion is confined to the signalling arm business.

The Court: More than half?

A. Yes, sir, more than eight-tenths, or three-fourths.

Q. Will you please tell the Court, just how far

[Testimony of Masick Magarian.]

your business extends, as far as the market is concerned?

A. The territory, we cover, is practically the eleven Western States. However, we have made sales in Canada. We have approval there. We have a few agents in the east, Minneapolis and we have an agent in [42] Honolulu, but most of the sales are made in the eleven Western States.

Q. Do you know Mr. Lynn? A. Yes, sir.

Q. Who is Mr. Lynn?

A. Mr. Lynn is my representative in the signal arms.

Q. Where is he located?

A. He is located in San Francisco at 2048 Market Street.

Q. Is he your local representative or does he represent you in the entire sale of your entire output?

A. He represents me on the entire output, principally in the Western states. However, he gets his commission on the extended territories, like Canada, and some of the eastern parts.

Q. Whereabouts is Mr. Lynn located in San Francisco? What is his address?

A. 2048 Market Street.

Q. Do you know the defendants personally?

A. I have met them once or twice.

Q. Do you know Mr. Wallace?

A. I have met him once or twice.

Q. Do you know Mr. Elwell?

A. Well, I have seen him but I never talked to him.

[Testimony of Masick Magarian.]

Q. Do you know anything about the defendants' business?

A. Oh, I must. He is in the arm signalling manufacturing business. He makes other boosters, something of that sort that I don't know anything about.

Q. Are the defendants your competitors in the market? A. Yes, sir.

Q. Do the defendants occupy territory, somewhat similar to yours? A. Practically so.

Q. Are the defendants selling signalling arms?

A. Yes, sir.

Q. Where do the defendants have their place of business?

A. In El Segundo. I understand they have a place here in San Francisco, that is a warehouse.

[43]

Q. Do you know Mr. Mitchell? T. A. Mitchell?

A. No, I don't know him.

Mr. Schapp: At this time, your Honor, I wish to offer in evidence the two patents, United States Patent 2,153,634, issued to Masick C. Magarian on the 11th of April, 1939.

(The patent was marked Plaintiff's Exhibit H, in evidence.)

Mr. Schapp: I also wish to offer in evidence Design Patent No. 109148, to Masick C. Magarian on the signalling arm issued the 5th day of April, 1938.

(The patent was marked Plaintiff's Exhibit I, in evidence.)

[Testimony of Masick Magarian.]

Q. You are still the owner of these two patents, Mr. Magarian? A. Yes, sir.

Q. You are the inventor of the signal arm protected in those two patents? A. Yes, sir.

Q. Will you please relate to the Court, the history of the development of your invention?

A. Well, the arm has taken a development coming over a period of two or three years. The first arm was made with a large lens of about three inches in diameter with a head, and then along with that was two small Stimsonite reflectors, placed on a narrow part of the arm, and made in a number of pieces.

Q. Is this the arm you first put on the market, when you started manufacturing? A. Yes, sir.

Q. The witness is referring to Plaintiff's Exhibit A. This arm has been introduced as part of the Answers to Interrogatories.

The Court: How is that described in the Interrogatories?

Mr. Schapp: As Exhibit A, as the first arm manufactured by the plaintiff. This arm is assumed to be used over two years prior to the filing date of the patent applications.

Q. Now, Mr. Magarian, when did you begin developing the patented arm, when did you first start working on it?

A. I first started [44] working on it in the early part of 1934.

Q. The early part of 1934?

[Testimony of Masick Magarian.]

A. Yes, sir.

Q. That is, right before you began doing business in selling signalling arms?

A. That's right.

Q. What was the first step you took in that connection?

A. I inquired about various types of lenses. I sent out blue print sketches showing the types I would like to have for use, and in that connection, I remember my first lens was a rectangular oblong lens that I sent to "Guide" for information.

Q. Mr. Magarian, I will show you a blue print here, marked Plaintiff's Exhibit 2, and I will ask you whether you have seen that print before?

A. Yes, sir, I have. I made this print personally, after I made the tracing of this blue print—after I made the original drawing.

Q. Do you know what became of the original drawing?

A. The original drawing is not in our hands, now. We don't know where it is. It is made on tracing paper, which is more or less fragile, and we didn't keep them for any length of time.

Q. Do you remember when you made that drawing?

A. This drawing was made in April, 1934, about the 25th.

Q. April 25th?

A. As indicated on the blue print here. (indicating)

[Testimony of Masick Magarian.]

Q. You will note on the blue print a term used "Stimsonite prisms" will you explain to His Honor, what you mean by "Stimsonite prisms"?

A. Stimsonite prisms are the small pyramids placed in the inner side of the reflector and act as a reflecting surface. The most important character of the prisms are, that at various angles a source of light is practically reflected back to the original source. In other words, if you place a mirror, a flat mirror, if you rotate that, you will not get the reflecting light back. However, the important property of this lens is the light is re- [45] flected back to the source, regardless of the angle of incidence.

Q. What did you do with that sketch, after you made it, Mr. Magarian?

A. I sent the blue print to the Guide Lamp Division for a quotation.

Q. Did you receive a reply from them—who did you send it to?

A. The Guide Lamp Company. It was a Stimson Reflector Division at that time.

Q. Did you get a reply? A. Yes, sir.

Q. I will show you an original letter from Stimson Reflector Division and ask you if that is the reply you received?

A. Yes, sir, this the letter I received from the Stimson Reflector Company.

Mr. Miller: May we see the blue print, and letter you are referring to.

[Testimony of Masick Magarian.]

Q. Will you please read into the record the first sentence of the third paragraph of the letter.

A. (Reading.)

“In regard to your print #2 of the rectangular piece, we have experienced some difficulty with our glass source relative to furnishing a part as of your drawing. In taking this matter up with the factory, they have advised us that the glass, as of your drawing, would not have sufficient width for practical molding, and even if they were able to mold a glass 1" wide, the effective Stimsonite width would only be about $\frac{3}{4}$ ". Due to this condition they have furnished us with a rough sketch and we in turn have had the Engineering Department make up a drawing as of their sketch, which we submit herewith for your inspection.”

Q. What next did you do in connection with the development of your invention, Mr. Magarian?

A. Well, that particular lens wasn't used, of course, and we had on the market the first type, we have talked about. We continued with that, and in the meantime, I made other drawings with the idea of someday, developing the patented arm that we have on the market at the present time. We made oval shaped lenses, and inquired about prices on molds and the cost of individual parts.

Q. In connection with your further development of your invention, [46] did you have any further correspondence with the Stimson Reflector Division

[Testimony of Masick Magarian.]

or the Guide Lamp Corporation? As I understand it, your Honor, one is the continuation of the other. The Guide Lamp Company is the continuation of the Reflector Division.

The Witness: That is right.

Q. Did you have any further correspondence with the Guide Lamp Corporation?

A. Yes, sir.

Q. I will show you a copy of the letter here, and ask you whether you have seen that before?

A. This is the letter we sent to Guide Lamp Corporation, in Indiana, in connection with the new blue print or new design, that we developed at a later date.

Q. Now, I will ask you, Mr. Magarian, to read into the record the last paragraph of the first page of that letter.

A. (Reading)

“We are enclosing herewith a blue print of a new Stimsonite reflector which we believe will solve the difficulty we are having with the small lenses. We wish to have a quotation on this particular lense and also cost of mold. This lense has been designed to fit a particular size arm on our signal. Kindly submit these prices immediately by airmail so that we may be in a position to make the change without delay.”

Q. Did you write that letter?

A. Yes, sir.

[Testimony of Masick Magarian.]

Q. Did you mail this letter to the Guide Lamp Corporation? A. Yes.

Q. When you mailed the letter did you include a sketch of the blue print referred to in the paragraph you just read into the record?

A. I don't know just where the blue print is on that. You mean the blue print——

Q. (Interrupting) Did you include that blue print in the letter?

A. Yes sir, there was a blue print in the letter. It showed an oval lens, similar to what we have on the arm. The only difference, was, as I remember it, the length wasn't exactly the same length. It was three inches instead of $3\frac{1}{4}$ inches.

Q. Is that blue print available, do you have it?

A. I don't think we have it. I don't know where it is. [47]

Q. Did you receive any response from the Guide Lamp Company?

A. I did receive a reply to that letter. I think we received a modified blue print of the lens.

Q. I will show you a letter here and ask you to identify the same.

A. Yes, sir, this is the letter, we received from the Guide Lamp Company in reply to my letter, I just read.

Q. Will you please read the date of that letter?

A. The date of the letter is December 30, 1935.

Q. Will you read the first paragraph into the record, please?

[Testimony of Masick Magarian.]

A. (Reading)

“This will confirm our wire to you of today’s date relative to quotation on your #1A lens, our E-3559.”

Q. Do you know what that “1A” lens refers to?

A. That is the arbitrary number assigned to a blue print I am referring to in my letter.

Q. What does E-3559 refer to?

A. That is the number Guide Lamp Company assigned to that particular drawing or blue print.

Q. Now, I wish to show you a sketch or blue print, and ask you to identify this blue print.

A. This is the blue print I received from Guide Lamp Corporation. It is a blue print, they referred to in their letter numbered E-3559.

Q. Does the drawing in that blue print coincide with the drawing you submitted to the Guide Lamp Corporation, known as A1?

A. It is exactly the same, the outside dimensions are the same. They made some changes in the dimensions of the glass which, as I understand it, would be of a more practical mode, would have more practical properties in the construction of the glass.

Q. Mr. Magarian, did you say that this blue print, E-3559, is the same as the one you submitted?

A. Yes sir, well with the modified minor changes, I spoke of. It has the outside dimensions and the step on the outside edges. [48]

[Testimony of Masick Magarian.]

The Court: In regard to the glass, the thickness of the glass, that is all.

Q. What were the further developments of the invention?

A. The further development of the invention was, I made that lens slightly longer; instead of three inches, I made it $3\frac{1}{4}$ inches. I had a mold made from which the present lenses were made. It is the same shape only a quarter of an inch longer. I think it was an eighth of an inch wider, as I remember it.

Q. When did you reduce your invention to practice and when did you have the first completed signalling arm?

A. I had the first arm in about May 1936; that is, the arm that I disclosed to others. At that time it was one submitted on a government bid. The end was exactly the same, as this, but the back part, that is the pivoted part was slightly different.

Q. I will show you a signalling arm here, it doesn't seem to be marked by any manufacturer, and ask you whether you can identify this arm.

A. Yes sir, this is the first time I used the molded lens in a shaped arm as shown here. This was submitted on a government bid, and from this point (indicating) we modified this part here (indicating) and developed it into that. Of course, this was a special arm, developed for the government, in which they specified a certain length. It

[Testimony of Masick Magarian.]

was the first time we introduced the lens in the arm.

Q. When did you submit that arm to the government?

A. It was around March of 1936, I don't remember the exact date. That arm was made according to government specifications. They specified that the head here be a certain length. They had a long arm folded up out of one set, like that, (indicating) There were small buttons placed on the arm, small reflector buttons, about one-half inch in diameter. We had this new lens developed, and we submitted [49] according to their specification. It wasn't used however.

Q. I wish to offer this arm in evidence, and ask that the same be marked Plaintiff's Exhibit J.

(The arm was marked Plaintiff's Exhibit J in evidence.)

Q. When did you produce an arm exactly like the patented arm?

A. I made the dies during 1936, that is until August. I was ready to put it on the market in August, 1936, the arm I have now, as you see it, was placed on the market.

The Court: It was placed on the market in August, 1936? A. Yes, sir.

The Court: That was because it was made at that time? A. That's right.

The Court: Is that arm in evidence?

[Testimony of Masick Magarian.]

Q. That arm is in evidence as—not this particular one, I will refer to this one here.

The Court: What is it marked?

Q. I call your attention to the signalling arm marked Plaintiff's Exhibit C. Is that the arm you placed on the market in August, 1936?

A. That is the arm we placed on the market in 1936.

The Court: That is the arm described in your patent?

A. Yes, sir.

The Court: You mean the utility patent?

A. Yes sir.

Mr. Schapp: Both patents are based on the same structure. Will it be necessary to introduce it or is it considered in evidence?

The Court: It may be considered in evidence. You have marked it already and there is no objection to receiving it now.

Q. Mr. Magarian, in looking at the plate on this arm, I find some—six more patent numbers, I will ask you whether you know what those patents cover?

A. The patents on the name plate here, refer to the patents on the lenses. [50]

The Court: All of them?

A. All of them.

Q. Will you please explain why you put those numbers on there?

A. All lenses we buy have the numbers molded on the inside edge, and in the construction of the arm, these numbers were hidden. That was the

[Testimony of Masick Magarian.]

only practical place I could put it in order to see the numbers.

Q. Do you know who controlls those patents?

A. I think Mr. Stimson owns the patents. They licensed them out to various corporations. The Guide Lamp Company which is a subsidiary of General Motors.

Q. It is your understanding that these patents are controlled or at least licensed out to the Guide Lamp Corporation? A. Yes sir.

Q. The Guide Lamp Corporation has the right to place those patent numbers on the lenses?

A. Yes sir.

Q. Is it your opinion that the Guide Lamp Corporation know about the patent numbers on the signal? A. Yes sir.

Q. Did you ever submit a signal arm of this type with the patent numbers on it, to the Guide Lamp Company? A. Yes sir.

Q. Did you ever inquire of them whether they had any objection to your placing the numbers on the signal arm? A. Yes sir.

Q. Did you receive any reply from them?

A. Yes sir.

Q. What did they say?

A. Well, they said they didn't object to it, as long as it was applied in the manner shown in the sample that I submitted.

Q. You were under the impression, all of the time, that you merely put those numbers on them for the protection of the Guide Lamp Corporation?

[Testimony of Masick Magarian.]

A. Yes sir.

Q. Mr. Magarian, I now show you a letter from the Guide Lamp Division, addressed to Industrial Scientific Company, and ask you to identify the same.

A. This is the letter we received from the Guide Lamp Division dated October 1st, 1937. [51]

Q. Will you please read into the record the second paragraph of the letter?

A. (Reading)

“Incidentally we would be interested in having you ship one of these signals, and it will be perfectly in order for you to bill us for same. Kindly arrange to mark this shipment to my attention.”

Q. In reply to that letter did you ship a single one of your arms to Guide Lamp Company?

A. Yes sir.

Q. Did you receive a reply from the Guide Lamp Division acknowledging receipt?

A. They acknowledged receipt of the arm.

Q. I will show you a letter from the Guide Lamp Division addressed to you, dated October 18, 1937, did you receive that letter?

A. Yes sir.

Q. Will you please read the first paragraph of that letter into the record. A. (Reading)

“We wish to acknowledge and thank you for your letter of the 15th, also the signal arm recently mailed to my attention.”

[Testimony of Masick Magarian.]

Q. Did you have any further correspondence on the matter, with the Guide Lamp Corporation?

A. Yes, I think we did. We received other letters, I believe.

Q. Did you direct enquiry to the Guide Lamp Company asking them, if they had any objection to your putting the numbers on the signalling arm?

A. Yes, I have.

Q. Is this a reply to a letter you received from the Guide Lamp Corporation?

Mr. Naylor: What is the date of that letter?

A. This letter is dated February, 1940.

Mr. Naylor: What date in February?

A. The 28th of February.

Q. Will you please read the second paragraph of that letter into the record? A. (Reading)

“We have no objections to your including these numbers on your device, assuming that you will incorporate them in the same manner that you have on previous printed matter.”

Q. Now, at this time, I wish to offer in evidence the blue print marked “No. 2” and I will ask that the same be identified as [52] Plaintiff’s Exhibit K.

(Blue print marked Plaintiff’s Exhibit K in evidence.)

Mr. Naylor: Was that the blue print received from the Guide Lamp Corporation?

Q. That is the original blue print. I offer in evidence a letter from the Stimson Reflector Divi-

[Testimony of Masick Magarian.]

sion to Industrial Scientific Company, and ask that the same be——

The Court: What date?

Mr. Schapp: It is undated, if your honor please. The date was admitted from the letter. It refers to this blue print dated——

The Court: I would like to inquire as to the pertinency of these letters.

Mr. Schapp: To merely establish the receipt of the blue print and the fact that the blue print was seen by somebody else.

Mr. Naylor: We object to it on the ground of lack of foundation. We don't know whether it refers to this blue print.

The Court: What information can you give us about this?

The Witness: May I see the blue print? It refers "in regard to your print #2 of the rectangular piece, we have experienced some difficulty with our glass source relative to furnishing"——

The Court: The question is, when was that letter received by you?

The Witness: There is no date on this letter that I see.

The Court: When was this print—the original blue print, Exhibit K, made?

The Witness: I think that date is on there, April 25, 1934.

The Court: When was it sent by you to the Lens Company?

[Testimony of Masick Magarian.]

The Witness: I have a letter of that. May I refer to it?

The Court: When did you send this blue print to the Guide Lamp Company? [53]

The Witness: I don't know if I have a letter or not.

The Court: You can refresh his memory, if there is a letter here, counsel. What is your best recollection as to when you sent the original blue print to the Lens Company?

The Witness: The date of the blue print is marked April 25, 1934, and it seems to me I did make the blue print and send it approximately the same date.

Q. Is it your best recollection that you sent it immediately after you made the blue print or not?

A. Yes, I did send a letter relative to this blue print and the reply is this letter which is not dated. Incidentally this is the only rectangular lens that I have. They refer to it as print #2 of your rectangular piece.

The Court: That is the only rectangular piece you ever made a drawing of, is that right?

A. That is right.

The Court: You think you sent it to the lens company about the time it was made?

A. That's right.

The Court: Do you know how long after, you received a reply from them?

[Testimony of Masick Magarian.]

A. I don't remember, no.

The Court: Well, was it a short time or a long time?

A. It was perhaps a week or so.

The Court: Will you offer that in evidence, is there any objection to it?

Mr. Miller: No objection.

The Court: It may be admitted.

(The letter was marked Plaintiff's Exhibit L in evidence.)

Q. I also wish to offer in evidence the copy of the letter dated December 22, 1935, and ask that the same be marked Plaintiff's Exhibit M.

(The letter was marked Plaintiff's Exhibit M in evidence.)

Q. I also wish to offer in evidence a letter from the Guide Lamp [54] Company to Industrial Scientific Company dated December 30, 1935 and ask that the same be marked Plaintiff's Exhibit N.

(The letter was marked Plaintiff's Exhibit N in evidence.)

Q. I also wish to offer in evidence the blue print E-3559, dated December 26, 1935, and ask that the same be marked Plaintiff's Exhibit O.

(Blue print marked Plaintiff's Exhibit O in evidence.) [55]

Q. Now, Mr. Magarian, in your business, do you keep regular books of account?

A. Yes, sir.

[Testimony of Masiek Magarian.]

Q. It is customary in your business to keep books of account? A. Yes sir.

Q. Who makes the entries in those books?

A. Mrs. Magarian, and now at the present time, I have another helper.

Q. Are those entries made by someone that is familiar with the transactions when they are made?

A. Yes sir.

Q. Are you familiar with the books?

A. In a general way.

Q. Prior to this trial, did you go over the books, or have an assistant go over the books, with the object of ascertaining the monthly business transacted in connection with this signalling arm?

A. Yes sir.

Q. Have you made a summary of the contents of your books? A. Yes, we have.

Q. To refresh your recollection, I will show you a list of figures and will ask you to identify those?

A. Yes, these are the monthly sales of signals made from the time we started in the signalling [56] business.

Q. Will you please read into the record the totals for the years 1935 to 1940?

A. The total for 1935—that particular year we have four months from the time I started the business, for September, October, November and December, the total reads 2873 signals. That is 1935. The total for 1936 shows 14039; for 1937, 18832; for 1938, 23478; for 1939, 20724 and 1940

[Testimony of Masick Magarian.]

from January to June inclusive, the total is 7656.

Q. What do those totals refer to, amount of business transacted or signalling arms sold, or what?

A. These figures refer to the number of signalling arms sold.

Q. By you? A. By me, yes.

Q. Now, Mr. Magarian, I will ask you to point out—what do you consider the principal advantages of your signal arm as shown in the two patents, over the signalling arms that belong to the prior art or over signalling arms you manufactured before?

A. Well, it has at least three desirable advantages that I can see. In the first place, it's appearance, stream lined appearance, smooth appearance. In the second place, its service as a reflective arm and signalling device on account of its large reflective area, and in the third place, the advantages we have in manufacture and construction, making the design and it is easily assembled.

Q. Now, Mr. Magarian, just prior to your introduction of the patented arm, as I understand it, you manufactured this arm, Plaintiff's Exhibit A?

A. Yes sir.

Q. Mr. Magarian, will you be kind enough to show to the Court just how these two different arms are assembled and point out, to his Honor, what the advantages of your new arm over the old arm are, and where they come in? Will you demonstrate to his Honor how those parts are manufactured? [57]

[Testimony of Masick Magarian.]

A. (Witness assembles signalling arm) Now, as I understand it you want the old type first, is that right? In the old type, you have the parts that you see here; the narrow punching which carries the two little lenses, these are placed on racks of this kind, as you see here, in the assembling and then I will put them all down, two or three will be sufficient. Then these small lenses are placed in the cavities here. Then we have a small piece of cork cut, we place on the lenses. Then we place the amber colored lenses on top and so on. Then after that we place the other half on top and then we rivet the two metal parts together, by putting a rivet right through these little holes and that clamps. We do the same thing to the arrow part, which is a punching, place the glass there, around cork, the lenses again and that is assembled and riveted also. After that is done, we put this on here, shove it here, go through another operation of rivetting the arrow, and that is the general idea of the old type. Of course, I am not showing you the assembly of the rest of this, which is——

Q. We are not interested in that at the present time.

A. Now, in the new arm, the construction is different. It has just two pieces to work with. In this particular design, we use the identical trays, here, we place these arms here, just make this like that. Then we drop the lenses in these cavities—pockets. Then we had a gasket, which is made of

[Testimony of Masick Magarian.]

one piece, extending through the length of the arm, where, the lenses are located. Then we place the lenses on top. In connection with the placing of the lenses on top, we are able now to use a rack, that we have, because the arm is such that you can place these lenses in position, here, by referring to these arms, which save these all in place, here. Then we put this on, and then we go around and put these lenses against these guides. Then we take the frame off and use the other half on top. Then we take [58] these and put it on a rivetting machine that clamps the lenses together.

Q. Now Mr. Magarian, I will show you an arm of the Detroit Products Company, marked Plaintiff's Exhibit E, which was admittedly sold by Detroit Products Company, and will ask you when was that arm first brought to your attention?

A. Well, this was—we first noticed this when it came out. I suppose it was a month or so, after it was on the market, in 1938, I think it was.

Q. The defendants say, in response to interrogatories, that they introduced this arm, sometime in January of 1938, would that approximately correspond to your ideas?

A. Well, it was the early part of 1938.

Q. The early part of 1938?

A. I don't know the exact time they started it.

Q. Did you see that signalling arm on any trucks?

[Testimony of Masick Magarian.]

A. Yes, I have seen it on a lot of trucks.

Q. Did you have that signalling arm, yourself, in your possession, at any time? A. Yes sir.

Q. How did you secure that signalling arm?

A. I think we bought one in the wrecking house in Fresno.

Q. Do you remember when you bought it?

A. That was a little while after he started putting it on the market.

Q. I will also show you the defendant's signalling arm marked Plaintiff's Exhibit D and will ask you if you have seen this one on the market before? A. Yes, I have seen that too.

Q. Now, I wish to ask counsel, if counsel will stipulate that the inside construction involves that washer—it has a common separator—it has a separator in it?

Mr. Naylor: It just has a separator.

Mr. Schapp: It has substantially the same separator as in [59] the plaintiff's device.

Mr. Naylor: It just has a separator.

Mr. Schapp: One common separator extending over all three windows?

Mr. Naylor: I wouldn't say for sure, it could one or two.

The Court: You know what it is?

Mr. Naylor: I am not sure if that is one or two. I wouldn't know without opening that particular one.

[Testimony of Masick Magarian.]

Mr. Schapp: That common separator, that is quite an important feature in this invention.

The Court: You haven't got the tools to open that. Will you bring them this afternoon?

Mr. Naylor: We will stipulate that some we make, would have a single separator. We have made some, I believe, that may have been made in two pieces but we do make arms with a single separator.

Q. Yes. When was this arm first brought to your attention, Plaintiff's Exhibit D?

A. It was in the middle part of 1938.

Q. The middle part of 1938?

A. The latter part, I would say, in about the summer of 1938, I think it was.

Q. Do you remember where you happened to see it first?

A. The first time I saw it, it was hanging on trucks.

Q. If your honor please, it is admitted that the defendants began selling this arm in June 1938, according to the answers to interrogatories. Mr. Magarian, after you saw the first signalling arm of defendants, Plaintiff's Exhibit E, on the market, did you do anything about it?

A. Is that the—are you referring to the first type, with three lenses.

The Court: Yes.

A. Yes, I felt the arm was a copy of my arm, on which I had received a design patent so I saw

[Testimony of Masick Magarian.]

my attorney in Fresno, and asked him to write a letter in that connection. [60]

Q. Who was your attorney in Fresno?

A. Frank Willy.

Q. Is this a copy of a letter your attorney wrote to Detroit Products Company?

A. Yes.

Q. Will you please read that letter into the record?

The Court: Do you want to see it, counsel?

Mr. Naylor: I would like to see it.

Q. I may briefly explain it. It is giving notice of infringement. I will offer it evidence as Plaintiff's Exhibit S.

(Letter marked Plaintiff's Exhibit S in evidence.)

Q. I have another letter giving further information of infringement dated August 10, 1938. Is there any objection to offering it?

The Court: Do you wish to offer those as one exhibit. What are the dates?

Mr. Schapp: The first one is dated April 25, 1938 and the second one August 10, 1938.

The Court: How do you describe the letters?

Mr. Schapp: Notification of infringement.

The Court: They may be admitted as one exhibit.

(Thereafter a recess was taken until 2:30 p. m. August 1, 1940)

[Testimony of Masick Magarian.]

Afternoon Session

MASICK C. MAGARIAN

resumed the stand, on direct examination.

Direct examination

Mr. Schapp: Q. Mr. Magarian, when we closed this morning, we offered in evidence two letters regarding infringement, written Detroit Products Company, by your attorneys in Fresno. Did you receive any reply to any of those letters?

A. Yes sir.

Q. I will show you a letter here on the letter-head of Detroit Products Company, is that the reply you received?

A. Yes sir, this is the letter we received from Detroit Products Company.

Q. I will ask you to read this letter into the record Mr. Magarian? A. (Reading)

“We are informed you contend we are infringing upon certain design patent rights which you claim to hold for a [61] signalling device. Please be advised that we have changed the design of our Signal and are calling in all Signals in question.

This gesture on our part does not mean we acknowledge infringement on any patent rights which you claim to hold but is an act of co-operation with our dealers whom we have supplied for the last seven or eight years.”

[Testimony of Masick Magarian.]

The Court: What is the date of that?

A. The date of the letter is August 13, 1938.

Q. I will offer this letter in evidence and ask that the same be marked Plaintiff's Exhibit T.

(Letter marked Plaintiff's Exhibit T in evidence.)

Q. Mr. Magarian, I will ask you, what is your general experience in education along engineering lines?

A. Well, you mean what training I have had.

Q. Your education, in the first place, are you a graduate of any college?

A. I have a bachelor of science in the Massachusetts Institute of Technology. I hold a masters degree in physics from Stanford University. I have had three years teaching experience in the University of Hawaii, in physics and mathematics. I have also been connected with two firms in Chicago. I was development engineer for one, for a year and a half. Then I worked for another concern in Chicago for three and a half years, as development engineer in charge of the engineering and drafting department.

Q. How long has your experience been, in signal arms?

A. The experience I have had was since the time I started manufacturing. It was about since 1934——

Q. 1934?

A. —was the first time I started doing anything with signalling.

[Testimony of Masick Magarian.]

Q. Have you read the two patents, are you familiar with the terms in your own patents?

A. Yes, I am.

Q. Did you study and analyze the claims in your patents?

A. Yes, I have. [62]

Q. You feel you are qualified to explain the terms thereof, to the Court?

A. Yes sir.

Q. Now, I will read to you the elements found in the claim, and I will ask you to point on the two defendants signal arms, where you find those elements present, if you do? Referring first to this arm, Plaintiff's Exhibit E, and then to this arm Plaintiff's Exhibit D, and take them up as I call them out, on each one, each of the elements in the claims.

A. You want me to refer to both, at the same time.

Mr. Naylor: If the court please, I think it might make a clearer record if the witness dealt with each arm separately. We are dealing with patented claims here and we don't want any ambiguity on the record.

Mr. Schapp: Very well, we can take up, first, Plaintiff's Exhibit E—"In a lens mounting on a signal arm" What do you call a lens mounting?

A. The mounting refers to the metal edges, here, that hold the lens in place.

Q. "Two identical elongated plates"?

[Testimony of Masick Magarian.]

A. The elongated plates refer to the two metal portions, one on each side of the arm.

Q. "Having registering marginal flanges"—where do you find these flanges?

A. The flanges are the outside border edge, that is shown here on the arm, as I point out.

Q. "And spaced body portions"? What do spaced body portions refer to?

A. Spaced body portions refer to the pressed portion here, which is pressed upward on the metal part.

The Court: Is that mentioned in Claim 1?

Mr. Schapp: Yes your honor. "With registering openings therein."

A. The openings refer to the metal holes in the two halves. The registering means that they are exactly opposite each other.

Q. "Lenses having flanges bearing on the inner margin of the open- [63] ings"?

A. The flanges on the lenses, I haven't taken this one apart, but the one I took apart, had small flanges on the lenses, and the plates were pressing on the lenses.

Q. "Bearing on the inner margin of the openings" What does that have reference to?

A. Well that refers to the inside of this hole just adjacent to the lens.

Q. "Having a body portion projecting through the latter"

A. Yes, well that refers to the lens having a

[Testimony of Masick Magarian.]

slight convexity, that extrudes or goes a little higher than the surface of the metal.

Q. "A separator between the lenses"

A. A separator, of course I can't see it here but the ones I took apart, had a long cardboard separator which was extended covering the three lenses on the inside.

Q. "And means for securing the flanges of the plates together."

A. The means referred to, are the rivets that are used here, on the flanges.

Q. "Whereby the body portions of the plates are made to clamp the lenses on the separator"

A. The body portions again are the elevated portions of the metal part which presses on the flanges of the lenses, that presses the lenses together with a gasket in between.

Q. "The lenses having shaped inner faces"?

A. That refers to the irregular shape on the inside of the lenses.

Q. "To produce the desired reflecting effects".

A. That is the reflective property of this irregular surface on the back.

Q. What is the desired reflecting effect?

A. Well, the desired effect is to reflect light back to the source of the operator of the truck that is behind.

Q. "And the separator serving to prevent play between the lenses and the plates."

A. Well, that simply means, the separator acts

[Testimony of Masick Magarian.]

as a gasket so as to not allow any play between the lenses. [64]

Q. Do you have all those elements in that particular exhibit E you have in your hands, now?

A. Yes sir.

Q. Now referring to Claim 3—"In a direction indicator, a signal arm comprising a pair of elongated plates".

A. The plates are these two metal plates again.

Q. The Court: I understand that that device that the witness has in his hand was withdrawn?

Mr. Schapp: No, it wasn't withdrawn.

The Court: Haven't we a letter here of August 13, saying that the device had been changed?

Mr. Schapp: This device was changed to the other device, but this device was an infringing device and has been on the market.

The Court: All right, go ahead.

Q. "Arranged face to face" What does that have reference to? "In a direction indicator, a signal arm comprising a pair of elongated plates arranged face to face".

A. Just opposing each other, one on each side.

Q. "And having marginal flanges"

A. Marginal flanges again refers to the flat portions on the outer edges, here.

Q. "The body sections of the plates being offset".

A. The body portions refers to this curved or formed part which is a little higher than the flanges.

Q. "To define an elongated lens receiving space".

[Testimony of Masick Magarian.]

A. Well that refers to the chamber that this forms, the cavity if you want to call it *it* that, forms for the lenses to fall into.

Q. "Each of the body sections having an alined series of openings therein".

A. That refers to the holes again.

Q. "Registering with those of the other."

A. They stay directly opposite each other.

Q. "Lenses mounted in the opening of each body section".

A. The [65] lenses are placed in the openings.

Q. "And having flanges bearing on the inner faces thereof".

A. The flanges refer to the flanges on the lens.

Q. Do they bear on the inner edges of the plates?

A. Yes, they do bear on the inner edges of the plates, adjacent to the holes.

Q. "And a common separator for spacer opposing lenses".

A. The separator is the same separator. It is a common separator that extends throughout the arm.

Q. "The separator being coextensive with the lens receiving space".

A. That, as I say, extends throughout the three lenses, covers the three lenses.

Q. "To facilitate positioning of the same during assembly".

[Testimony of Masick Magarian.]

A. Well that refers to the cavity or this body portion here, gives in assembling.

Q. Now Claim 4: "In a direction indicator, a signal arm comprising a pair of elongated plates".

A. The same plates again, two arm plates.

Q. "Arranged face to face"

A. Arranged face to face, opposing each other.

Q. "Having marginal flanges."

A. Same flanges referred to the outside edges.

Q. "The body sections of the plates being offset".

A. That is the curved portion in the center part of the arm, which extends beyond.

Q. "To define an elongated lens receiving space". .

A. Well that still refers to the cavity, I have been talking about. It is formed by the form portions of this arm.

Q. "Each of the body sections having an alined series of openings".

A. The series of openings refer to the three openings here, oblong openings that aline themselves in one straight line. [66]

Q. "Registering with those of the other".

A. Well, to register with the opposite side.

Q. "Lenses mounted in the openings of each body section"

A. Lenses are the ones mounted in the holes.

Q. "And having flanges bearing on the inner faces thereof".

[Testimony of Masick Magarian.]

A. Flanges of the lenses are being pressed by the body portions of the metal arm.

Q. "And a common separator for spacing opposing lenses".

A. The separator is the same separator we have been talking about.

Q. "The separator being coextensive with the lens receiving space".

A. The separator extends and covers the three lenses.

Q. "To facilitate positioning of the same during assembly."

A. The cavity, here, forms a sort of a pocket for the lenses to drop in there, and also the gasket.

Q. "And the faces of the body section being parallel".

A. The faces referred to are the flat planes, this plane, this flat portion and the opposing side being parallel in extension.

Q. "So as to exert uniform pressure on the interposed lenses and the separator".

A. Well, this flat portion being flat, that applies uniform pressure to the flanges of the lenses on each side.

Q. Now, I hand you Plaintiff's Exhibit d, and ask you to point out to his Honor, where you find the different elements, as set forth in the claims? Claim 1: "In a lens mounting for a signal arm"

A. The mounting is the two plates holding the four lenses.

[Testimony of Masick Magarian.]

Q. "Two identical elongated plates".

A. The oblong plates, identical being the same in construction.

Q. "Having registering marginal flanges".

A. The flanges are the flat portion on the outside edges that register, coincide.

The Court: Isn't Exhibit D similar to Exhibit E except that Exhibit D has two of the reflecting elements and E has three. [67]

Mr. Schapp: That is the only difference, your honor.

The Court: Is it necessary to go into a detailed description of this exhibit?

Mr. Naylor: May I offer one suggestion, your Honor. There is one difference in addition to that which has been pointed out, by your Honor. The arm is clamped by the plates which form the signal arm. The clamps are external of the arm.

Mr. Schapp: That point is only of importance in connection with Claim 2 which has been dropped. A description of this exhibit would be quite similar to the description already given of the other exhibit which is here.

The Court: I don't think it is necessary.

Mr. Schapp: Very well, your Honor, unless counsel insists.

Mr. Naylor: We don't insist on it, your Honor.

Q. Mr. Magarian, I just want to ask you one more question. The defendant and you are competitors in the business of manufacturing and selling signalling arms, as I understand it?

[Testimony of Masick Magarian.]

A. Yes sir, we are.

Q. Are there any other competitors in the western area?

A. Not to amount to anything. There is one in Oakland, a small concern that makes some. I don't feel he is a competitor.

Q. As far as the bulk of the business of selling signalling arms is concerned, you and the defendant, are the principal manufacturers in the western area?

A. That is right.

Q. Do you know any other manufacturer in the west or anywhere else, that is attempting to infringe your patent and manufacturing a signalling arm similar to yours?

A. I do not.

Mr. Schapp: You may cross-examine. [68]

Cross Examination

Mr. Miller: Q. Mr. Magarian, I will hand you the plates, the reflectors and the separator, that form the outer end of the arm you were using this morning.

The Court: Identify it.

Mr. Miller: It hasn't been given an exhibit number yet.

Mr. Schapp: This is plaintiff's Exhibit A.

Mr. Miller: And that you have in your hand is a duplicate of the outer end of Plaintiff's Exhibit A?

A. Yes sir.

Q. You were selling arms having that outer end, like Plaintiff's Exhibit A, prior to November 16, 1935?

[Testimony of Masick Magarian.]

A. Yes, I started selling those in April or May of 1935.

Q. You recognize this (exhibiting list of witness) as a list of the concerns to whom you sold that type of arm, that you supplied as part of your interrogatory answers?

A. Yes, they seem to be the ones we sold.

Q. Those all relate to this same kind of arm, Plaintiff's Exhibit A, do they? A. Yes.

Q. The purchases that are in that list, when you sold them the arms, similar to Plaintiff's Exhibit A, did you ask them to keep it secret that they had that arm or would they be permitted to put it on their trucks and use it whenever they wanted to?

A. Yes, there were no secrets about it.

Q. I offer the list as Defendant's Exhibit L. We have used up to K in our depositions.

(List marked Defendant's Exhibit L in evidence.)

The Court: That is the original list of purchasers of the first arm you made?

Mr. Miller: Like Exhibit A, the one I have Plaintiff's Exhibit A? A. Yes sir. [69]

Q. Now, in that outer end of the arm, Plaintiff's Exhibit A, you likewise have a lens mounting for a signal arm, do you not? A. Yes, sir.

Q. It comprises two identical elongated plates, doesn't it? A. Yes, sir.

Q. Those plates having registering—

A. The term elongated there, is slightly questionable. I don't want to say, it is exactly elongated,

[Testimony of Masick Magarian.]

because it isn't. The term elongated don't apply to this, as well as the arm where you have a definite elongation. The word elongated may not exactly apply to this.

Q. In those plates you have in your hand, which are a duplicate of the outer end of Plaintiff's Exhibit A, are longer than they are wide, aren't they?

A. Yes, slightly longer.

Q. They have registering marginal flanges, don't they?

A. Yes.

Q. And spaced body portions? A. Yes sir.

Q. With registering openings therein?

A. Yes sir.

Q. And you have lenses having flanges bearing on the inner margin of the openings?

A. Yes sir.

Q. In that outer end? A. Yes sir.

Q. You have body portions of the lenses through the latter. That is, through the body portions of the plate?

A. Yes sir.

Q. Do you have a separator between the lenses in that outer end?

A. Yes sir.

Q. Do you have a means for securing the flanges of the plates together?

A. Yes sir.

Q. Whereby the body portions of the plates are made to clamp the lenses on the separator?

A. Yes sir.

Q. You have lenses having shaped inner faces to produce desired reflecting effects?

A. Yes sir.

[Testimony of Masick Magarian.]

Q. And the separator serving to prevent play between the lenses and the plates?

A. Yes sir. [70]

Q. Anything about this Claim 1 of your patent that is not readable on this type of device, and sold more than two years prior to the time you filed your patent application?

A. The only question I would raise would be the elongated arm, which I can't readily admit that this is an elongated arm, when we have a definite arm there, as shown in the patent, definitely elongated.

Q. Well, you associate those plates with another plate, when you make up the completed arm of Plaintiff's Exhibit A, that would make an elongated plate out of two pieces, isn't that it?

A. It is elongated when you have another piece, but that narrow portion, there, is not what the first claim has in there. It has no marginal flanges. It is not shaped like the other one. You are talking about two things. Now. I regarded your first question as talking about this particular head or end.

Q. The sole ingenuity of this claim, is the fact you make this plate a little bit longer than they are in the outer end of Plaintiff's Exhibit A, that I am holding in my hand?

A. Is that what you consider a little bit? Well, you are asking me a question and I have to answer it in accordance to your question. You say it is a little bit. I say it would be—

The Court: You may answer it, yes or no.

[Testimony of Masick Magarian.]

Q. And then explain your answer.

A. It is longer than—that is, the patented arm is longer in length.

Q. Now considering Claim 3 of your patent. You have in that outer end, Plaintiff's Exhibit A, a duplicate of which you have in your hand—in a direction indicator, a signal arm comprising a pair of elongated plates arranged face to face?

A. Yes sir, except reserving that elongated term.

Q. And having marginal flanges?

A. Yes sir.

Q. The body section of the plates being offset to define an elong- [71] ated lens receiving space?

A. Yes sir.

Q. Each of the body sections having an alined series of openings?

A. No, we don't have an alined series of openings in that old arm.

Q. You have only your large one?

A. We have a round lens which doesn't convey the idea of alinement. Where you have an elongated lens, the edges are parallel. You have parallel edges on the lenses, and the contour of the metal plate. The alined referred to the oblong lenses being in alinement. I can't see how you can refer to alinement on one round opening.

Q. What is the advantage of having an elongated lens?

A. The advantage of having an elongated lens is to have a maximum area of reflection without

[Testimony of Masick Magarian.]

increasing the width. In other words, in an oblong lens we try to cover as much of the metal portion as possible, from the practical standpoint.

Q. Is that the advantage over having a row, of say, three circular lenses like you have, here, in Plaintiff's Exhibit A? A. Yes sir.

Q. You don't claim to be the originator of elongated lenses, do you? A. No sir.

Q. That was old in the art, when you first acquired your lenses? A. I don't know.

Q. Had you ever seen any elongated reflectors prior to the time you acquired them?

A. No, sir.

Q. Have you studied the prior patents cited against your application, while it was pending in the patent office? A. No, I did not.

Q. In this outer end of Plaintiff's Exhibit A, a duplicate of which you have, you have lenses mounted in the openings, and having flanges bearing on the outer faces thereof, do you not?

A. Lenses. Well the term there is plural. Here we have one lens. We have one lens in it, whereas there, your claim words say "lenses" mounted in [72] the openings, whereas this is just one.

Q. You have one on each side, however, in that one? A. Yes.

Q. Having flanges bearing on the inner faces thereof. Those lenses have those flanges?

A. Yes sir.

[Testimony of Masick Magarian.]

Q. A common separator for spacing the opposing lenses? A. Yes sir.

Q. The separator being coextensive with the lens receiving space to facilitate positioning the same during assembly?

A. No, it isn't coextensive. It doesn't facilitate the assembling, that we have in the other construction. That is, it isn't coextensive, it is a round gasket.

Q. Well, you have a round lens receiving space there in that exhibit, don't you?

A. That is true.

Q. The separator is coextensive with that round receiving space?

A. The term coextensive used there, refers to an extension of the three lenses on the entire arm.

Q. When the bare claim is taken into consideration, but in this particular case, you have a coextensive separator, coextensive with the size and shape of your lens receiving space in that outer end of Plaintiff's Exhibit A?

A. Well, if you want to limit it in that way, yes.

Q. You say you have read your patent application over; that is, the specification?

A. Yes sir.

Q. Do you find any disclosure in the specification of your patent, say, about the separator being coextensive?

A. You mean in the specification?

Q. Yes, any disclosure outside of Claim 3 and 4?

[Testimony of Masick Magarian.]

A. I have to go through the whole thing. It speaks of the separator but your question is whether it is coextensive?

Q. Whether there is any disclosure—

A. I don't see it not going through every line, but I don't see of any reference to being co- [73] extensive in the specification.

Q. I wish you would look through it rather carefully, and also note and see whether or not you have the word "common" mentioned in the specification, or any synonym of it, outside of what is in Claim 3 and 4?

A. No, I don't see any. It just refers to a separator.

Q. Then, as far as the original disclosure is concerned, the separator might be common or not common?

A. That is true. It is defined and it talks about it in the claim.

Q. You see the word "common" in the claim but you don't find any definition for it in the specification, isn't that correct?

A. In the first claim it says—

Q. I meant exclusive of the Claim, Mr. Magarian, don't consider the claim for the word common?

A. I don't quite understand.

Q. Disregarding the claims, leaving those out, consider for the time being, as far as disclosure in

[Testimony of Masick Magarian.]

the specification is concerned, the separator might be common or not common is that correct?

A. Do you have to refer to the body of the specification or also to the drawings? Of course, as I understand it the drawings are part of the specification and the patent, as far as the drawings on the patent goes, the elongated common separator is shown.

Q. Where?

A. It refers to it in Figure 4-23; it refers to a separator there in Figure 2. You have a separator shown by a dotted line extending over the—just beyond the lenses.

Q. What makes you think the dotted line refers to the separator and not to the inner wall of the lens receiving space?

A. The inner wall of the space is very much curved and I would take it, that that dotted line would refer to a definite boundary on the lens—I mean on the separator.

Q. Is the shape of the lens receiving space different from the shape of the separator?

A. In the shape, the general shape, they [74] are both the same. However the metal is pressed and it is curved. Where you can not come right in and say it is a definite line, there or a curved point. Here is the point (indicating) you can't say it is a definite line.

Q. You have done drafting? A. Yes sir.

Q. Haven't you been able to show the edge, or

[Testimony of Masick Magarian.]

the one extreme of an inside or a hollow cylinder by a dotted line? A. Yes.

Q. Suppose you want to show the inside of, or the extreme of the inside of the concave surface in the right hand end of the separator, or just beyond that, as shown in Figure 4, how do you show that?

A. I think I could explain that if you would give me one of my samples of the pressed arm so I could talk definitely.

Court: You can do it on the black board.

A. I can show it definitely. I have never had any experience sitting up here in the witness stand. As I understand it, you are trying to show that that dotted line is not the separator, all I can say here is this. That this portion of the metal part—we have a flat surface. You can not show anything there in the form of a dotted line because there is nothing there to show on the drawing. You see a definitely dotted line in this portion. (indicating) That is referring to this gasket. You can't interpret that any other way. There is no argument about it.

Q. How do you know? You don't find a reference character on Figure 2 pointing to the separator, do you?

A. No, there is no number there, on that part.

Q. Is it impossible that this dotted line, you see in Figure 2, don't indicate the internal boundary of the lens receiving space? A. Is isn't possible.

Q. Why not?

[Testimony of Masick Magarian.]

A. As I said, the dotted line is shown in this portion, where it is flat. It is impossible to show a dotted line [75] because there is no edge to show that dotted line.

Q. Now how many different types of separators—How many different types of signalling arms have you placed on the market, altogether?

A. Well, I've had a number of changes made. For example, when I first started making that, I had two small lenses. I was asked to put on another lens, making three little lenses, which is not shown there. It is a different arm. That would be one change. Then I changed those little lenses to another type of lenses, Catafote Manufactured lenses. That would be another type or modification or change on that patent design. Then I have changed some parts of the mechanism, minor changes, improvements and so on.

Q. Plaintiff's Exhibit A, this one here, was the very first one you put out on the market?

A. That is right.

Q. You say somebody asked you to increase the size or the number of the lenses?

A. The officials in Sacramento thought it would improve the arm, by adding another lens, where your left hand is, about in that position, so I made the four lenses, altogether, on each side.

Q. When did the officials in Sacramento advise you they thought it would be better, to have two large lenses and three small ones?

[Testimony of Masick Magarian.]

A. That was the time, when I was having that approved. They thought it would be better, from their approval standpoint, to have another lens, so I added on another lens.

Q. When was that?

A. That was done in 19—That was in 1934 around in August, while I was getting approval—August, 1934, when I obtained my approval on that arm.

Q. Was August, 1934, when the State Officials told you they thought it would be better to increase the number of reflectors? A. Yes.

Q. It was August, 1934, was it, that the State Officials told you that they thought it would be better to increase the number of re- [76] flectors?

A. August, 1934, is when I received my approval. The change was made. It must have been four weeks before that time they recommended that change.

Q. You recognize this arm, I now show you, as being one of the new arms that had the three small reflectors and one large one, you manufactured following that approval?

A. This is one type I have made, yes sir.

Q. And you made that from and after August, 1934?

A. This one was modified. It was after August, 1934.

Q. I will offer this arm in evidence as Defendant's Exhibit M.

(The arm was marked Defendant's Exhibit M in evidence.)

[Testimony of Masick Magarian.]

Q. Then you say you changed that, to the Catafote button. Do you recognize this arm as being one of your manufacture, that embodies the three catafote buttons in place of the prismatic reflectors?

A. Yes.

Q. You made that, when?

A. This was made in 1936, in the beginning part of the year, around in February.

Q. 1936? A. 1936.

Q. I will offer this signal arm in evidence as Defendant's Exhibit N.

(The arm was marked Defendant's Exhibit N in evidence.)

Q. How do you describe that. What kind of buttons or reflectors? A. Catafote.

Mr. Schapp: If your honor please, I wish to raise an objection, at this time, it has not been proven this arm wasn't sold two years prior to the date—

The Court: It may have. It isn't part of the prior art. Objection overruled.

Q. Referring to the exhibit, I show you the exhibit that had catafote buttons. How did you happen to substitute the catafote buttons [77] for the round reflectors with the prismatic backs, as shown in Plaintiff's Exhibit A?

A. The catafote button is more efficient, than the Stimsonite reflector of that dimension. The efficiency is much greater. The efficiency in reflecting back.

[Testimony of Masick Magarian.]

Q. Did the State Officials have anything to do, in making that change? Did they suggest that to you? A. Yes sir.

Q. When?

A. About the beginning part of 1936.

Q. And did they tell you, at that time, if you were going to use a Stimsonite reflector, it had to be pretty large, as compared with the size of the arm?

A. No, they never said anything to me, about increasing the size of the lenses or anything of that sort.

Q. Did they say the Western Catafote button was more efficient than the small circular button, that you see here in Exhibit A?

A. Yes sir, they said it was more efficient.

Q. But they told you that the large Stimsonite Reflector, as large as the one you had on Exhibit A was all right? A. That's right.

Q. But if you employed the small one, the Western Catafote was better? A. Yes sir.

Q. You knew, at that time, the State wanted the use of large reflectors on signalling arms before they would approve them?

A. No, sir, because the catafote button is one-half inch in diameter, whereas the buttons, here, are one inch on the outside.

Q. But if you were going to use a reflector of the Stimsonite type, that the State wanted them

[Testimony of Masick Magarian.]

large, as compared with the size of the signalling arm?

A. If they wanted it, they never mentioned it to me.

Q. In making up an arm of the type of Plaintiff's Exhibit A, and Defendant's Exhibit M, you made these parts of the arm by the use of die stamps or with dies? A. Yes sir.

Q. How many dies did you have to make up, in making up these two [78] arms?

A. You mean all the dies pertaining to the arm—the completed arm, or are you referring to parts?

Q. Referring to the part of the arm, excluding the clamp and everything back of the clamp?

A. Well, I would have to compute that.

Q. Suppose you were going to make up Defendant's Exhibit M, how many dies would you have to make up to stamp out the metal parts of the arm?

A. The two halves being identical, of course. We have, really, two parts to make here. This part here required, first, the operation was to chop up the parts in small rectangular pieces.

Q. So that took one die?

A. One die made the rectangular part.

Q. The next operation was a forming die, which formed the metal out, as indicated by the boundaries?

A. The next were the inner bounds; the next operation was a die which was required to make

[Testimony of Masick Magarian.]

the holes, small little holes for the rivets; large lens holes. The next die was a die required for trimming the outside edges. That makes four dies counting the first die, where you just squared off the rectangular pieces. That would be four dies.

Q. Four on the head and one on the body, five altogether?

A. Four dies on the head. One to chop these arms up; second to form it. The second operation was to make holes. The third operation was to make the formed channel, here, which means there are 3 dies to make the long piece, here, this back portion.

Q. That would be a total of seven dies used on Defendant's Exhibit M. A. Seven.

Q. Did you have to make new dies when you made the change from two small reflector buttons of Plaintiff's Exhibit A, in order to make Defendant's Exhibit M?

A. I made the change right into the die. I had this particular hole (indicating) and I used the same die.

Q. Both Plaintiff's Exhibit A and Defendant's Exhibit M took seven [79] dies?

A. That's right.

Q. When you changed over to make, Defendant's Exhibit N, with the catafote button, how many dies did you use there?

A. That required the same number of dies.

Q. Were you able to save any of the dies you

[Testimony of Masick Magarian.]

used in making Plaintiff's Exhibit A or Defendant's Exhibit M, in order to make that exhibit?

A. Well, this arrow part is the same, and on this one, as I recall now, I did use the same die.

Q. Made it over? A. Made over.

Q. Now, in your arm, as shown in your patent, that makes the plates for Exhibit C, how many dies do you have to have for that?

A. I don't know—I have worked out a secret method of making those parts. I don't know if I should mention the number of dies. I have been making—we have spent thousands of dollars, making tools for that job and I don't want to expose my methods, that we have developed there.

Mr. Schapp: If your honor please, that question is objected to on the ground, it seems to be rather immaterial, for the purpose of this trial. We are just forced to disclose a process of making those assembled arms, which at the present time, he has successfully kept secret.

The Court: How is it material?

Mr. Miller: I am merely interested in this particular, your Honor. Was the number of dies used to make that, more or less, than the number of dies required to make Exhibits N, M, or Plaintiff's Exhibit A? A. Less.

Q. The expense involved was less in die manufacturing?

A. I wouldn't say that, because the type of die

[Testimony of Masick Magarian.]

involved, although it was less, it was a different type of die, altogether.

Q. The plates of Plaintiff's Exhibit C could be made with a single [80] bar die, couldn't they?

A. It is possible, I suppose.

Q. You have turned out stamps, haven't you, in your experience, approximately that shape, without requiring six or seven dies? A. That is true.

Q. It could be made, at a maximum, with two?

A. Yes, possibly one, I don't know.

Q. Do I understand your testimony, that you conceived of this idea in 1934, and although it was more expensive to make the dies for Defendant's Exhibit M and N and Plaintiff's Exhibit A, that you made these exhibits, using the more expensive and more numerous dies throughout 1935, and didn't bring out the construction in your patent, until 1936?

A. You misunderstood my testimony. One die or less dies doesn't mean less expense. If I want to answer you definitely. I would say the arm I have now, involves as much as eight times the cost, the way I am making it now, but I could not afford to put the equipment in. The die to make this is a lot more expensive than all the dies combined there. That can be very easily proved.

Q. Will you explain that?

A. It is a more expensive tool. You may use one die or you might make a part by having, perhaps eight or ten operations on a piece, with a simple die

[Testimony of Masick Magarian.]

and lose out on production, because you have so many operations; whereas, if I can make that part in one operation, that may require a very complicated die, and although you have a number of operations to perform, it is performed in one stamp.

Q. Mr. Magarian, I will show you Defendant's Exhibit D. I know that you saw this exhibit at the time, that was used in the depositions taken in this case, but had you ever seen any arms like that prior to the date of the deposition you attended?

A. Yes, I had.

Q. When did you see an arm of that character?

A. The arms I have [81] seen, of course, didn't have this particular type button there. They had three or six buttons, catafote buttons. I remember, I have seen this before the time of the deposition.

Q. Well, that kind you saw that had catafote buttons, when did you first see that?

A. I saw that long after I had approval on my first design.

Q. After you had approval on Plaintiff's Exhibit A?

A. Yes, it came long after that.

Q. That is the first one there?

A. Yes.

Q. Otherwise, except for the use of catafote buttons, in place of these reflectors, the arm you saw was the same?

A. The arm, I saw, was a little longer than this. This part was a little different, it was smaller.

Q. Did you learn at that time, or know who manufactured that arm you saw, that you are describing now?

A. Yes.

[Testimony of Masick Magarian.]

Q. Who?

A. It was Detroit Products Company.

Q. This arm you saw, did it have that raised center portion there, like on that exhibit D?

A. Yes.

Q. Did it have the marginal flanges riveted together, like you have on that exhibit?

A. Yes sir.

Q. Do you know whether it had a separator on it?

A. I know it didn't. There was no separator.

Q. Did you have a separator in your Exhibit M, between the catafote buttons on the opposite sides?

A. Yes.

Q. What did you put that in there for?

A. To hold the lenses in place.

Q. Is that a continuous separator?

A. No, sir.

Q. One for each pair of buttons?

A. That's right.

Q. Did you have any knowledge, or acquire any, as to how the form was raised in the center portion in the arm, you saw?

A. Well, [82] from the standpoint of tools, I didn't understand how it was made.

Q. It was made by a die and it was died out that way?

A. I suppose it was.

Q. Now, how would the cost of such a die, as would be required to stamp that out, be compared with the cost of the die to stamp it out on Plain-

[Testimony of Masick Magarian.]

tiff's Exhibit A, have you any information on that?

A. The dies on my arm were more expensive.

Q. By several times?

A. I don't know several times, because the arm you have in your arm, as I can see it—

Q. You are referring to Defendant's Exhibit D? A. Yes.

Q. Is that what you are referring to?

A. When I looked at this arm, I came to the conclusion at once, by examining the edges here, this arm wasn't trimmed with one die. It was cut in sheets, that is, all cut off separately. That is a procedure we don't have in our practice, because it would be a very laborious practice to manufacture.

Q. Approximately how much money did you spend in the dies for making up Plaintiff's Exhibit A; that is, stamping out the plates that formed this exhibit?

A. We make our own tools and dies. I wouldn't be able to tell you just how much we spent. We have our own tool makers. Our cost is less than if we should have them made out. I wouldn't be able to give you an estimate, unless I sat down and figured it out. Those are about four years old. I don't think I could answer that intelligently.

Q. Do I understand your testimony clearly that you and the Detroit Products Company are the sole manufacturers in this State? A. No.

Q. In signalling arms. I thought you said Detroit Products Company was your main competitor?

[Testimony of Masick Magarian.]

A. Yes, but that doesn't necessarily mean there are no others.

Q. There are others, then?

A. Some others, yes. [83]

Q. There are quite a number, aren't there?

A. I don't know what you mean by "quite a number." I know of about two more, besides ourselves.

Q. Well, there are more or less now, than there were in 1938?

A. I beg your pardon. Your question is, is there more manufacturers now?

Q. Manufacturers and distributors here, in this State or adjoining states, of signalling arms for trucks?

A. I would say there has not been an increase in manufacturers, because these other manufacturers were in some sort of signal business before, I would imagine, I haven't followed their history.

Q. Do you know of the Arrow Auto Safety Signal Company, of 4957 Sunset Boulevard, Hollywood, California?

A. I have heard of the name. I don't know their product.

Q. Never seen their arm?

A. I may have seen it without knowing it was their arm. I don't recognize their arm.

Q. Do you know Clyde C. Bussey, 2518 West 15th Street, Los Angeles?

A. No, I don't know him.

[Testimony of Masick Magarian.]

Q. You don't know of his concern or his arm?

A. Well, I don't know Mr. Bussey himself, but I know he has made some signals. What they were, I don't know.

Q. Do you know the Everite Manufacturing Company, Ltd., of 3144 College Avenue, Berkeley?

A. No, I don't know that.

Q. Do you know W. C. Otis, 1521 South Hoover Street, Los Angeles, California?

A. No, I don't know that.

Q. Do you know H. W. Phillips Co., 816 South Central Ave., Los Angeles?

A. I don't know the company but I have seen their arm.

Q. You are acquainted with their arm?

A. Well, I have seen it a number of times. It is similar to the one that Detroit Products manufactures, as I remember it, the button type. [84]

Q. Well, which type that Detroit Products made? A. Well, the button type.

Q. Using catafote buttons? A. Yes sir.

Q. Otherwise like this, Defendant's Exhibit D?

A. Similar to that, yes sir, only it had six lenses, six little buttons on each side.

Q. How long ago were you first acquainted with that?

A. I was acquainted with that, I would say, around—long after I had my first one out, I know that. It was when these people started coming into the field with these button types.

[Testimony of Masick Magarian.]

Q. That is, you were acquainted with that long after you put out Plaintiff's Exhibit A, which I hold in my hand now? A. That's right.

Q. Are you acquainted with Riehl & Range, 3907 San Juan St., Oakland, California?

A. I don't know that.

Q. Never acquainted with their arm?

A. No sir.

Q. Are you acquainted with Specialty Manufacturing Company of Los Angeles, California?

A. No sir.

Q. Do you know anything about their arm?

A. No sir.

Q. Are you acquainted with Eskilson & Brander, 1003 South Long Beach Blvd., Los Angeles, California? A. No sir.

Q. You are not acquainted with their arm?

A. No sir.

Q. How about Standard Electric Company, 1000 40th Avenue, Oakland?

A. I am acquainted with their arm.

Q. When did you become first acquainted with that?

A. That was sometime after I had mine out.

Q. The one like Plaintiff's Exhibit A?

A. Yes sir.

Q. How long after?

A. Well, I would make a guess of about six months after or a year after. I don't recall exactly but I know it was after I had mine out.

[Testimony of Masick Magarian.]

Q. You had yours out in 1934, you would say they had theirs out in [85] 1935?

A. As I say, I don't remember just what time elapsed there but it was a considerable time.

Q. How about Mr. Frank Mamiya, 1931½ Birch Street, Los Angeles, are you acquainted with his arm?

A. No sir.

Q. Are you acquainted with the fact, Mr. Magarian that the State Officials of California, put out lists, from time to time, and sketches of approved signals they have approved of?

A. Yes.

Q. Do you recognize this as being one of these approval sets, they put out?

A. Yes sir.

Q. Did you receive like copies from the State in 1938?

A. Yes sir.

Q. I will offer the copy of the State "Approved Truck Signals" for January 1, 1938, as Defendant's Exhibit next in order.

Mr. Schapp: If your honor please, I wish to enter an objection to this, because it is dated 1938. It was long after the filing date of both patent applications.

The Court: What is the offer for?

Mr. Miller: The testimony was offered here that Detroit Products and Mr. Magarian were the main competitors. I understood on direct examination they were his sole competitor.

The Court: No, he didn't say that.

Mr. Miller: I wanted to go into that, whether he was familiar with the other competitors, that were on the market at that time.

[Testimony of Masick Magarian.]

The Court: I don't see its materiality.

Mr. Miller: Very well, I will withdraw the offer.

Q. Mr. Magarian, I wish you would refer to your patent again, and particularly to Claim 4. Have you compared this claim, or contrasted it with claim 3?

A. I don't know if I have compared it but I have read it.

Q. Well, if this claim differs from Claim 3, does it amount merely in the recitation that the faces of the body sections being parallel [86] so as to exert pressure on the uniform lenses of the separator?

A. I would say, yes.

Q. Do you find any disclosure in the specification or the drawings, about the uniform pressure, or any reference made thereto?

A. Of course, you couldn't show it in a drawing. I don't know this word by word. Except on page 2 where it says "between the lenses I interpose a separator and the different parts are arranged and dimensioned so that when they are assembled the marginal portions of the body sections of the plates bear on the flanges of the lenses, and clamp the same from opposite sides upon the separator."

Q. Anything about uniform pressure as called for in Claim 4?

A. No I don't have "pressure". The word has not been used as I can see it.

Q. Referring to Plaintiff's Exhibit A, and particularly to the two small lenses on this exhibit,

[Testimony of Masick Magarian.]

when you clinch your rivets, drive your rivets through there, are those lenses clamped on the respective rivets with uniform pressure?

A. Well, in this particular arm, are you referring—

Q. I appreciate that this particular arm has been slightly mutilated, but I am referring, now, to an arm in perfect condition, and which would be a duplicate of that arm?

A. This particular design, you will notice that the form portion adjacent to the lenses are tapered. It doesn't bear on the lenses properly. You can just take this and rotate it around, so I would say it doesn't bear uniform pressure, whereas, in this type, we have a flat surface pressing on the flat margins of the lenses. There you have a condition where you would approach a uniform pressure, I would say.

Q. Well, those that were brand new and in perfect condition, similar to Plaintiff's Exhibit A; when you made them in 1935 and you drove the rivets home, did they have the small ends as tight? [87]

A. We had difficulty with that, we couldn't hold them in position.

Q. Some were loose and some were tight?

A. They would get loose very quick because, as I say, the form portion wasn't flat; it was more or less tapered. You can just take these lenses and rotate them around.

Q. Were they originally tight, when you completed making the manufacture?

[Testimony of Masick Magarian.]

A. They stayed tight for a very short time, especially when the paint was more or less soft, and made to stick on there for a while, but eventually they would get loose. They wouldn't bear any pressure on the gasket, to speak of.

Q. The separator was put in between the small lenses for the lenses to back up against?

A. Yes sir.

Q. They were intended to be tightened up with equal pressure on the lenses?

A. To prevent any breakage of the lenses.

Q. Or any loose play that was there in the separator? A. That was the purpose, yes.

Q. Just what was there about your arm, as shown in your patent or exemplified by Plaintiff's Exhibit C, that was new, that gave to the arm, the advantages you speak about?

A. In the first place, we eliminated the number of parts. We reduced it down to a minimum in our construction here where we have only two, as far as elemental parts are concerned. In the second place, we were able to design an arm which had a neat appearance, streamlined, I should say, over our older type where we had a head and narrow portion, which gave it a very pleasing appearance.

Q. Maybe you misunderstand me. I am not asking you to compare your new arm with Plaintiff's Exhibit A but I understood you had certain advantages in your new arm over the prior art; you would refer not only to Plaintiff's Exhibit A but

[Testimony of Masick Magarian.]

other arms that were on the market or that you knew about? Now, comparing it with everything you [88] knew about, what was there new about this arm, Plaintiff's Exhibit C?

A. We have accomplished certain manufacturing advantages, by having a cavity in here (indicating), a chamber whereby we can place these lenses very easily; that cavity also helps place the gasket co-extended, a gasket, which incidentally, is one unit. That makes our assembling much simpler. The other thing we accomplished on this arm, is the fact, we have a large reflective surface, that is, the lenses constitute approximately forty percent of the reflected arm. In the prior art, where the small buttons were used that was not accomplished. We, as I say, we have a large reflected surface and that gives the arm efficiency, because a large object is more easily seen, there is more area for reflection. In the prior art small buttons were used, the efficiency of the button, as far as area goes is high, it may be higher than the Stimsonite. However, it isn't possible to get a large area with a catafote type, small button, which is essential because you can take, for example—I can give you an analogy here. While the intensity of the distant stars are many times more than the moon, yet you can notice the moon more readily than the stars because of the area; that is the same principle you have here. We have a large area exposed, we have an advantage over the other type where a small button is used. I don't know if that is what you want.

[Testimony of Masick Magarian.]

Q. Then one thing of newness about your arm, is that you use a large area of reflected surface?

A. That is right.

Q. You use three of them, that are larger than the ones in Plaintiff's Exhibit A?

A. That is one thing, along with the fact, we have a formed chamber, here, the body mounting here, which makes it very easy in our assembling of the elements and the cost of labor.

Q. Did you consult with Mr. Schapp, while your application was [89] being prosecuted before the Patent Office?

A. I didn't have anything to do with the application itself. I asked him how he was coming along that was all.

Q. Did he ever show to you then or send you a copy of the Elliott patent?

A. I have seen some since but I don't recall Elliott. It might be, I have seen it, I don't know.

Q. You didn't cooperate with him in the preparation of any of the amendments or arguments that were filed?

A. No, I had nothing to do with that.

Q. I will show you a copy of the Elliott Patent No. 1,445,817, issued May 9, 1932, do you recognize that patent?

A. I have seen this recently.

Q. Do you understand how he assembles together, the parts of an arm?

A. Yes I have an idea.

[Testimony of Masick Magarian.]

Q. Do you understand that he makes two plates that are exactly the same shape? A. Yes.

(Attorney hands Court a copy of Figure 2, and 3 of the Elliott Patent.)

Q. Do you understand that those two plates, 21, are counterparts of one another?

A. What do you mean by counterparts, you mean identical?

Q. We assumed that they are. Do they have spaced body portions, with lens 22?

A. Yes, I would say they have although they don't show any lens in Figure 3 to show the body portions on the flat part of the arm. I don't see any body portions there, whereas in our sketch we have shown that.

Q. In Figure 2 he shows the body arm bulging out around the lens, doesn't he?

A. Yes he does.

Q. This would constitute the body portion?

A. Well, I don't know. The cross section figure in Figure 2 refers to a line through the [90] center of the arm. It isn't clear whether that cross section is continuous or whether that body portion goes around the lens or not, because there are no lines showing it.

Q. How would you make it, if you were showing that drawing?

A. Well, you're talking about the drawing, I can't assume how it should be made. I am going entirely by the drawing.

[Testimony of Masick Magarian.]

Q. Well, he has contact margins on those plates, doesn't he?

A. The cross section drawing, yes.

Q. Have you compared or contrasted the size of the circles—circle 22 in Figure 3 with the size of the supposed surface of the lenses in Figure 22?

A. No, I have not compared it, no.

Q. Now, Mr. Magarian, isn't what you have done here, is to substitute for Mr. Elliott's lens, 22, two Stinsonite lenses, such as you have used in Plaintiff's Exhibit A, with a separator between them and multiplied or duplicated along the length of the arm?

A. Two lenses, you say.

Q. Yes, two Stinsonite reflectors such as you have in Plaintiff's Exhibit A?

A. Are you referring to the narrow portion of the arm, or the whole thing. When you say two, there are three lenses on each side.

Q. You have a separator on each of these two lenses on Plaintiff's Exhibit A, don't you?

A. Yes.

Q. In place of Elliott's one piece lens, you have used two Stinsonite lenses back to back with a separator between, and you multiplied it along the length of the arm?

A. Those lenses, by the way, are an entirely different type lenses, whereas in the drawing here, a solid lens, a glass, is shown, the common separator is not there.

[Testimony of Masick Magarian.]

Q. And in Plaintiff's Exhibit C, you still have the same idea, only you have made your lenses of uniform shape and size?

A. I wouldn't say I have the same idea. I don't know what you mean, because we [91] have six lenses and they are Stimsonite lenses and they are separated by a common separator. You don't have that here.

Q. Does it make any difference—by the word common you mean a single separator?

A. A single extending, coextensive, I would say.

Q. Going the entire length of the arm, so as one separator will serve all six lenses?

A. That is right.

Q. Does it make any difference whether it is in one, two or three pieces?

A. Yes, it does. It would require more work in the manufacture of the small parts and considerable difficulty in placing them in the assembly, whereas, if you have one you are handling just one. Three, you have three parts to handle.

Q. How much more would it involve to use that separator split in half and put two pieces in there and butt them together?

A. Two separators?

Q. One separator made in two pieces—two halves of the separator?

A. Well, do you mean to cut the separator in two?

Q. Suppose I took the separator you have in your hand and cut it right in half, right across the

[Testimony of Masick Magarian.]

center, so that I had a separator cut in two halves, how much more labor would it involve?

A. There would be a little more work.

Q. How much more?

A. I can't tell you exactly, that would depend on the person assembling it. There would be more work.

Q. All he would have to do would be put in two pieces there instead of one?

A. Yes, it is two pieces; it is more work, that is all I can say but when you ask me how much, I can't tell you.

The Court: Those different parts are assembled by hand, are they?

A. Yes sir.

Q. In 1935, Mr. Magarian, were you making anything besides arm signals? In 1934, I should say?

A. That was the signal—the [92] signal was my main line. I don't remember making anything else, unless I made some tools for somebody else, but the signal was—1934 was when I worked on the idea, but in 1935 was when I really started manufacture. I was making tools from the time I obtained my approval in August, 1934, until the middle part of 1935, I was making the tools I used for manufacturing my first design.

Q. Did you ever contemplate a signal with a lens longer than three and a half inches in it?

[Testimony of Masick Magarian.]

A. Yes, I think I have. That rectangular lens was longer than three and a half inches.

Q. When?

A. We talked about it this morning.

Q. That is this blue print, Plaintiff's Exhibit K?

A. Yes sir.

Q. That was to be for a signal arm, how long?

A. I had no definite length worked out at that time.

Q. How many of those lenses were you going to use in there?

A. I don't know if I had any definite length or numbers worked out, but I was trying to get from the Guide Lamp Company, a lens, a long, narrow lens, if it was possible to manufacture it. I had never seen any lens of that type.

Q. Then you didn't have the conception of your present arm in 1934?

A. Not in the same form.

Q. What was your conception in 1934?

A. In 1934, I had that lens, for the idea of using it possibly on the arm I have there, where the little buttons were used, because those were not very efficient. I thought I could make a better arm by having a uniform or long piece in that portion.

Q. That is, in place of having these two small buttons, on each side, as in Plaintiff's Exhibit A, you were going to have one long reflector occupying

[Testimony of Masick Magarian.]

those spaces, now occupied by those two small buttons?

A. The exact idea I had—of course, I was trying to make a long lens, an oblong lens, and see if I could possibly have the [93] part molded.

Q. The only idea you had at that time, was to see whether Stimsonite would give you an oblong lens, is that right? A. That is right.

Q. Had you seen Stimsonite lenses on the market or in use, prior to making this drawing, Plaintiff's Exhibit K? A. Yes sir.

Q. Did all those Stimsonite lenses have these flanges at the edge of the lens?

A. The first time I saw a Stimsonite, was on a Ford V8 I had, on the tail light. You know how they have it on the tail light where they had a light in back of the lens; in fact, all of the General Motors cars have Stimsonite tail light reflectors and also some other cars, Ford, Chrysler are all licensed under Guide Lamp Company, as I understand it.

Q. All Stimsonite reflectors, you say prior to making up this drawing, Exhibit K, had bulging body portions and flanges at their edges to put them in some kind of a frame, so that the body portion would bulge through a flange and would contact on the inside of the flange, isn't that true?

A. Yes, that is true.

Q. Referring to this exhibit, Plaintiff's Exhibit J, why did you continue these lenses along this

[Testimony of Masick Magarian.]

exhibit, instead of having just three on the outer side?

A. Three is all that is necessary. Why didn't I have more?

Q. Yes.

A. Because the State law requires at least an illuminated portion of about twelve inches, and that is just twelve inches. It isn't necessary because it would increase the cost.

Q. When did the state require an illuminated portion of twelve inches? A. When?

Q. Yes.

A. Well, I don't know. I don't know if that law was over or not when I first introduced the reflector type that I made the first time. I don't think it was a definite law at that time and the question was discussed and I had to set an arbitrary figure [94] in order to conform to the requirements. That was, I would say—I started making signals in——

Q. 1934?

A. 1935, when I started making signals was the middle of 1935. I didn't manufacture signals in 1934.

Q. Oh, you started in 1935. I misunderstood some of your testimony, I beg your pardon. Now, Mr. Magarian, have you ever received any orders for purchasers for signal arms having two lenses on each side, oblong lenses?

A. Received any orders?

[Testimony of Masick Magarian.]

Q. Yes.

A. No I never remember receiving any orders of that type.

Q. You have never mistaken your signal arm for the Detroit arm, have you?

A. From a distance, yes, where it is used on the trucks because from a distance of about one hundred and fifty or two hundred feet, the lenses blend in together, and you see a continuous reflective area because these narrow portions here are rather small and they get lost and blend in. From a distance, yes, you can confuse them; right close I can tell myself.

Q. Have you ever encountered any purchaser that confused the two signals in making his purchase?

A. What form would I encounter?

Q. I don't know. I just asked you, have you encountered anyone?

A. No, not myself.

Q. Did you ever attempt to make a purchase of one of the Detroit arms at 537 Turk Street, yourself?

A. No, I didn't.

Q. Referring to this letter of December 22, 1935, which is Plaintiff's Exhibit M; this letter refers to a blue print here in your fifth paragraph, does that, as you would read that paragraph over, tell me does that have reference to Exhibit K or some other blue print?

A. No, the letter of December 22, 1935 is not

[Testimony of Masick Magarian.]

referring to the lens as referred to in print 2 of April 25, 1934. This letter of December 22, 1935 refers to an old lens. This is the lens we [95] have in the present arm, that we manufacture, that refers to that lens (indicating).

The Court: What exhibit would that be, A?

Mr. Naylor: That is Exhibit C, your Honor.

The Court: Refers to that, does it?

A. Yes sir. Now, I will make a correction there then. As I understand it, this refers to an oval lens, as I remember it, three inches long instead of three and a quarter but it is a similar lens, oval lens. I don't want to commit myself exactly, I know it is the oval lens because at that time, the latter part of December 1935, we were considering to make the change from the catafote button type used on that one and going to this type, we have now. I know definitely it refers to the oval lens.

Q. Well, you are unable to find that blue print, or the tracing, or the original of that blue print, that accompanied that letter of December, 1935?

A. We haven't the tracing because we make those tracings with a pencil on tissue paper. When the lens was not satisfactory we don't keep them very long, they dry up and crack. We don't keep them.

Q. When, in reference to the date of that letter, if such a tracing had been prepared, would it have been prepared?

[Testimony of Masick Magarian.]

A. I would say perhaps eight or ten days, in that vicinity, before that time.

Q. Prior to the date of the letter?

A. That's right, at the most, I would say. Usually we make our blue print and send it right on. We don't hold it.

Q. Do you have a letter or your copy of it—Plaintiff's Exhibit R is apparently a reply to a letter of yours? A. Yes sir.

Q. Do you have a copy of your letter?

A. I don't have it here, I have it in the file.

Q. Where, in the city or in Fresno?

A. I am pretty sure it is in [96] Fresno.

Q. Can you send for that letter?

A. I suppose I can, yes sir.

Q. Will you do that and produce it here?

A. I will try to do that, yes sir.

Q. Now, you gave some figures this morning—before I get to that—do you have any way of segregating the arms you sell, in your books so as to indicate whether or not the arm sold is like Plaintiff's Exhibit A or Defendant's Exhibit M, or Defendant's Exhibit N, here (indicating) with catfote buttons or Plaintiff's Exhibit C, the one that is of your patent?

A. Each one have their own numbers. When we made changes or improvements there were new numbers, assigned. Those new numbers appear on all packing slips.

[Testimony of Masick Magarian.]

Q. Is that kept on your books, how long do you keep the packing slips?

A. We have all the packing slips we have used.

Q. These figures you gave this morning, as I understood them, began in September, 1935, the figure that you sold?

A. These indicate the—for example in 1935, we were not manufacturing the type, we make now. Those figures in 1935 pertain to the arm we were manufacturing at that time.

Q. In 1935, I believe you gave the number 2873, that referred to what?

A. That referred to the first arm we were making.

Q. Like Plaintiff's Exhibit A?

A. That's right.

Q. And did you continue to sell any of that type like Plaintiff's Exhibit A or Defendant's Exhibit M or N in 1936, along with the type illustrated by Plaintiff's Exhibit C?

A. Yes, I think we sold some.

Q. And this figure for 1936, 14039, that includes signals of the type of Plaintiff's Exhibit C, and also of the type of Plaintiff's Exhibit A, and Defendant's Exhibits M and N?

A. I would say yes.

Q. How about the figure for 1937, does that likewise include both [97] types?

A. Well, at that time, in 1937, we were pretty well along with this type. We might have sold one

[Testimony of Masick Magarian.]

or two of our oval type, just very few occasionally, but from 1937, on we were entirely—practically selling the type we are selling now.

Q. Do you still keep any of these old type, like Plaintiff's Exhibit A, and Defendant's Exhibits M and N in stock?

A. We have about, I would say, about 6 or 7 of those arms at the most.

Q. Right now?

A. That is old stock.

Q. I noticed that on some of your earlier types you used a red reflector where as in your Exhibit C you use nothing but amber, was that on account of the State recommending the use of amber and telling you not to continue using any more red?

A. That change was brought about by myself. I was the one that suggested to the officials in Sacramento. Months after they agreed that was the proper idea, there is a definite reason for it. I was the one that really had that changed.

Q. Who did you discuss it with?

A. Inspector Sharkey and Mr. Cato.

Q. Do you know the purpose of having one side of these red and the other one amber, like in Exhibit M?

A. The purpose? At that time we used red because to the rear, they felt it should be red, because everything in the rear of the car is red. They used red reflectors, the tail lights are red, and it was sort of an assumption that that should be red

[Testimony of Masick Magarian.]

without going into any definite scientific reason for it.

Mr. Miller: That is all.

(Thereafter an adjournment was taken until Friday, August 2, 1940, at ten o'clock a.m.) [98]

Mr. Schapp: If your Honor please, it has been drawn to my attention that Plaintiff's Exhibits, from A to G have not been properly introduced in evidence and have not been made a part of the record. I wish to do that at this time, if I may be permitted to do so. I would like to introduce the original Magarian arm.

The Court: That has been introduced in evidence.

The Clerk: No, your honor, these Exhibits A to G have been referred to, they marked those numbers at the time of the taking of the depositions.

The Court: Exhibit A, is that the first arm?

Mr. Schapp: That is the first arm sold by Magarian.

(The arm was marked Plaintiff's Exhibit A in evidence.)

Mr. Schapp: Then, I have here, invoice number 1124, I ask that that be marked Plaintiff's Exhibit B.

(The invoice was marked Plaintiff's Exhibit B in evidence.)

The Court: What does that invoice relate to?

[Testimony of Masick Magarian.]

Mr. Schapp: The defendants tried to prove or have proved and it is an admitted fact that the signalling arm, Exhibit A, was sold more than two years prior to the filing date of the two applications. The facts are admitted and have no further significance.

Mr. Schapp: I would like to introduce in evidence plaintiff's new arm made in accordance with the patents as Plaintiff's Exhibit C.

(The arm was marked Plaintiff's Exhibit C in evidence.)

Mr. Schapp: I wish to offer in evidence the defendant's first infringing arm marked plaintiff's Exhibit E, and defendant's second infringing arm marked Plaintiff's Exhibit D. The ones they placed on the market.

The Court: Which is the first one?

Mr. Schapp: The first is the Exhibit E, that is defendant's [99] first infringing signal arm.

(The arms were marked Plaintiff's Exhibit E and D respectively.)

Mr. Schapp: There are two exhibits offered in the deposition, a sales tag identifying the sale made to B. Hansen from T. A. Mitchell, which was introduced as Plaintiff's Exhibit F.

(Sales tag marked Plaintiff's Exhibit F in evidence.)

Mr. Schapp: And a photostatic copy of the same sales tag, introduced as Plaintiff's Exhibit G.

(Photostatic copy marked Plaintiff's Exhibit G in evidence.)

WALLACE R. LYNN,

called as a witness on behalf of the plaintiff, being first duly sworn, was examined and interrogated as follows:

Examination by Mr. Schapp

Mr. Schapp: Q. Will you please give your full name? A. Wallace R. Lynn.

Q. What is your age? A. Forty-two.

Q. Residence?

A. 80 Junipero Serra Boulevard, San Francisco.

Q. Occupation?

A. Manufacturer's representative.

Q. Where is your business located?

A. 2048 Market.

Q. Will you be in San Francisco on June 4, 1940? A. No, I will be in Chicago.

Q. On what occasion will you go to Chicago?

A. For years, for the last fifteen years we have held our annual sales meeting for the Belden Manufacturing Company, the wire manufacturer that we represent, in Chicago. It has been their practice to hold their annual sales meetings the week prior to the Radio Trade Show, and that is the case this year. Our sales meeting starts on June 4.

Q. That will be in Chicago? A. Yes.

Q. Do you know Masick C. Magarian?

A. Yes.

Q. What is your connection with him?

(Deposition of Wallace R. Lynn.)

A. I represent the sale of his merchandise in eleven Western States on the same basis that we represent a number of other manufacturers. [216]

Q. Has Masick Magarian anything to do with this trip of yours to Chicago? A. Oh, no.

Q. Has he any control over your movements?

A. No. What do you mean by that?

Q. I mean if Mr. Magarian could tell you to stay here for June 4 instead of going to Chicago, if you had to obey.

A. No, he couldn't do that.

Q. I will show you a signal arm marked "Safety Truck Signal, State Approved," followed by a number of patents, "Manufactured by Industrial Scientific Company, Fresno, California, U. S. A." Who is the Industrial Scientific Company?

A. Manufacturers of that arm, and it is the company owned by Magarian.

Q. I will ask you to identify that arm if you can. A. To identify it?

Q. Yes.

A. I don't know exactly what you mean. It is the arm we have been selling for a long time.

Q. That is the arm you have been selling for Mr. Magarian and the Industrial Company?

A. That is correct.

Mr. Schapp: I want to introduce this arm in evidence now. I will call it Plaintiff's Exhibit C.

(The signal arm referred to was thereupon marked Plaintiff's Exhibit C.)

(Deposition of Wallace R. Lynn.)

Mr. Schapp: Q. Is that the arm you are selling for Mr. Magarian?

A. That is the arm. That is one of the types of arms that we sell for Mr. Magarian. [217]

Q. I will show you another arm containing two windows and marked "Detroit Products Company, Manufacturers, El Segundo, California, State Approved." I will ask you if you have ever seen that arm before or any arm just like it.

A. Yes, I have seen arms just like it.

Q. Do you know who manufactures that arm?

A. Well, yes. I know the name of the company that manufactures it—Detroit Products Company—as far as I know. I have never visited their plant. I assume that is the Detroit arm because it has the Detroit name on it.

Mr. Naylor: I move that that whole answer be stricken as based purely on hearsay, admittedly.

Mr. Schapp: Q. Have you seen that arm on the market in San Francisco? A. Yes.

Q. Where have you seen that arm?

A. The Western Auto Supply Company is the first one that comes to my mind.

Q. Have you seen it at any other place?

A. I am sure I have but I can't say exactly where, because I have never gone out to make any check on it. I mean, we have seen arms in a great many places on trucks and in various jobbers' places of business, but I have never made any written note or mental note exactly where I have seen them. It

(Deposition of Wallace R. Lynn.)

would be very easy, however, to get that information by going around and looking, because they are certainly around in places.

Q. Are these things sold at the present time, as far as you know?

Mr. Naylor: Pardon the interruption. May we have some [218] identification of this arm in the record so we will know what is being talked about?

Mr. Schapp: I will introduce this arm in evidence and let it be marked Plaintiff's Exhibit D.

Mr. Naylor: To which offer the defendants object on the grounds that no proper identification has been made and no foundation has been laid in the record for the introduction.

(The signal arm referred to was thereupon marked Plaintiff's Exhibit D.)

Mr. Schapp: Q. I will show you a third arm, which has three windows or lenses on each side, and which is marked "Manufactured by Detroit Products Company, El Segundo, California, Approved by the State," and will ask you if you have seen this arm before.

A. I have seen arms of that type, yes. I have seen that arm before.

Q. Where have you seen those arms before?

A. Oh, in the same place as we have seen the others—in jobbers, general stores, on trucks.

Q. In San Francisco?

A. All over the territory. I couldn't specifically name any one place because I haven't seen them

(Deposition of Wallace R. Lynn.)

in any individual place. However, I could go out and probably find some of them in San Francisco.

Mr. Schapp: I will introduce this arm in evidence and ask that it be marked Plaintiff's Exhibit E.

Mr. Naylor: To which offer we object on behalf of the defendants on the same grounds advanced as to Plaintiff's Exhibit D, [219] not identified, and no foundation laid.

(The signal arm referred to was thereupon marked Plaintiff's Exhibit E.)

Mr. Schapp: Q. Now, Mr. Lynn, I will ask you how long you have known Mr. Magarian?

A. Since the early part of 1935. I would say somewhere around March or April of 1935 was when I first met him. It might have been May, but it was one of those three months.

Q. Are you familiar with an arm that Mr. Magarian sold, placed on the market before he put this arm, Exhibit C, on the market? A. Yes.

Q. Can you give a brief description of the arm, as far as you remember, that Mr. Magarian had on the market before?

Mr. Naylor: That question is objected to as calling for testimony concerning a fact that is not in evidence.

A. Yes. He used a cataphoto type of button, a reflector button, instead of these large glass reflectors and, as I recall, there were seven of these buttons on each side, or six on each side. the same

(Deposition of Wallace R. Lynn.)

type of button as is used on these auto club signs on the road, you know, this reflector type of button, and they were set into an arm of about the same general shape, a little wider than this probably, and the buttons arranged so as to kind of point an arrow. It has been a long time since I have seen one of those. I don't know exactly how those buttons were placed, but, as I recall, they were in the form of an arrow.

Mr. Naylor: Pardon the interruption; as a possible means of [220] keeping this record clear of as many objections as we can, may we have Mr. Lynn fix the time that he saw this alleged arm prior to Exhibit C? In other words, establish some relationship between that and C; C has not been identified as far as date is concerned. I am not here just to make technical objections.

The Witness: Yes, I saw the arm in May or June of 1935.

Mr. Naylor: Q. You are referring now to Exhibit C? A. Is this Exhibit C here?

Mr. Schapp: This is Exhibit C (indicating).

A. No, I am referring to this cataphoto.

Mr. Schapp: Q. That was when?

A. May or June of 1935.

Q. Can you give a general comparison as to relative merits of the arm, Plaintiff's Exhibit C, and the arm manufactured before it by Mr. Magarian?

(Deposition of Wallace R. Lynn.)

Mr. Naylor: That question is objected to as calling for opinion testimony, and this witness is not qualified as an expert on signal arms.

The Witness: I do not know who would be better qualified, but anyway the original arm was subject to considerable criticism from the State Highway Department, and Bill Sharkey of the State Highway Department was continually suggesting that, if possible, the visibility of the arm be improved; so that Magarian worked on a number of ways and methods to improve the visibility of the arm, and out of his work a development came, this Exhibit C.

What was your question there? [221]

Mr. Schapp: Q. How does Exhibit C offer advantages over the arm previously manufactured by Mr. Magarian?

A. There is no question but that it has increased visibly at night. I mean the arm has greater reflective area and can be seen farther at night than the original arm that Mr. Magarian brought out, and I personally spent a great many nights on the highway with the Motor Vehicle Patrol out of Sacramento during the time that the new Motor Vehicle Code was being formed, because of the fact that, as an electrical engineer, and also my association with Magarian arm signal business, I helped them in the testing of a number of these motor vehicle developments or items that they were testing. I do not know exactly how to tell you, but the point is

(Deposition of Wallace R. Lynn.)

we were testing all types of arms and all kinds of combinations in order to get the greatest visibility and provide the utmost in safety for the truck operators and the motorists.

Q. Did you establish by your tests that this arm has greater visibility than the arm previously used by Magarian?

A. Yes. The amount of visibility in these arms was determined by the number of buttons or the amount of reflective area, and we could have increased the number of buttons in the original arm probably to the point where it would be all studded with them, but it would make the arm impractical; so that this Stimsonite reflector was the apparent answer to increased visibility and to make a practical economical arm.

Q. You are an electrical engineer? [222]

A. I do not hold a degree as an electrical engineer, but I qualify as a practical automotive electrical engineer. I do not hold a college degree as an electrical engineer.

Q. How long have you been selling signal arms? A. Since 1935.

Q. Did you sell the old arm for Magarian too?

A. Yes.

Q. Do you know when Mr. Magarian changed from the old arm to the new arm, Exhibit C?

Mr. Naylor: Mr. Schapp, I do not want to appear to be cantankerous about this, but this whole line of examination relative to the old arm is so

(Deposition of Wallace R. Lynn.)

indefinite and vague that I will have to interpose one objection right after another. If you have one of the arms, let us produce it and get it in the record so that this witness can be tied down to something definite rather than any one of a number of arms having one button or seven buttons or whatever it is.

(Discussion off the record.)

(The reporter read the question.)

A. I can't give you the exact date.

Mr. Schapp: Q. Approximately?

A. It would only be a guess, but I would say late 1935 or early in 1936. But, as I say, that would only be a guess. Without referring to the actual files, I couldn't tell you. I would have to go back and look at my records, which I have not done.

Q. Could you tell from memory whether there was any difference in the amount of sales when Magarian adopted the arm Exhibit C? [223]

A. Let me get this clear. Do you mean was there a difference in the number of arms sold before and after this type of arm came out?

Q. Yes.

Mr. Naylor: Referring to Exhibit C.

A. Yes, there was very definitely. There was a big increase in the sale of arms, of this type of arm. We sold a great many more of this type than we did of the other one, a great many more.

Mr. Schapp: Q. You are mentioning "this type"—

(Deposition of Wallace R. Lynn.)

A. Exhibit C. Yes, we sold a lot more of this Exhibit C than we ever sold of the earlier models. In fact, when that arm came out our sales really went to town.

Mr. Naylor: I move that that last remark be stricken from the record as being purely voluntary and not responsive to any question.

The Witness: Well, you asked if they had increased, and they certainly did increase with that arm, when it came out.

Mr. Schapp: Q. When was this arm Exhibit D first brought to your attention?

A. It was first brought to my attention by the purchasing agent of the Western Auto Supply Company in Los Angeles.

Q. Under what circumstances?

A. Just what the date was, I don't remember. Why, he told me—he had a sample in his office and said that he liked the finish on the Detroit arm better than on our arm and couldn't see much difference—I don't remember how he put it—but, in any event, he said the arms to [224] all intents and purposes were similar and that the finish was better.

Mr. Naylor: I will have to interrupt you. I am sorry I have to, but I move that that part of the answer which purports to quote what some third party said be stricken from the record as being purely hearsay.

The Witness: No, I have a letter to that effect from this purchasing agent, and I will be glad to

(Deposition of Wallace R. Lynn.)

dig that out of the files, because I was in a hurry when I talked to him about it, and I asked him to write me the whole story, and if I can find that letter you can have it, either one of you or both of you.

Mr. Schapp: Q. You say as near as you can from your recollection what he said.

Mr. Naylor: Same objection to this line of questioning, as to what somebody said, either by word of mouth or in a letter, concerning Exhibit D in this case.

Mr. Schapp: All right, your objection is in.

Go ahead and answer.

A. He told me that he was going to buy this Detroit arm unless we could improve the paint job, the finish on our arm, and he also told me he had a better price than we were giving him on our arm, and that if we wanted to improve our finish and meet the competitive price, that he would like to have our proposition. He was buying our arm at that time.

Q. About how many arms was he buying at that time?

A. I couldn't tell you. It was a lot of them.

[225]

Q. Approximately?

Mr. Naylor: That question is objected to. The witness obviously cannot testify to it from his recollection by his own admission.

The Witness: I couldn't approximate it. I mean you can say more than five hundred, yes, but to esti-

(Deposition of Wallace R. Lynn.)

mate it, it would be impossible. I would have to look it up. However, our records on that are pretty complete. I have the actual copies of the invoices and the billing from the time we started, and they are in our office and you can get them.

Mr. Schapp: Q. After this conversation did the purchases from the Western Auto Supply Company cease?

A. Not entirely, but they dropped off very substantially and they stopped almost entirely in the California division, that is, in California stores.

Mr. Naylor: This line of questioning is objected to as not calling for the best evidence. If there are records, let them be produced to show; then the question is further objected to as not binding on this defendant in any way.

The Witness: They continued to buy some arms, and those purchases were principally through their Oregon and Washington branches. All the billing on arms, however, goes to one place, the Western Auto Supply Company—I mean everything is billed to Los Angeles and then shipped to their various warehouse points, and we continued to ship to Denver, to Seattle, which were their two principal warehouses, but it was my understanding, [226] substantiated pretty well by the volume, that they bought their arms for their Oakland and Los Angeles branches from the Detroit Products.

Mr. Schapp: Q. Has the sale by the Detroit Products Company of arms Plaintiff's Exhibits D

(Deposition of Wallace R. Lynn.)

and E interfered with the sale of your arms Exhibit C?

Mr. Naylor: I will have to object to that as assuming a fact which has not been proved, to-wit, sales of any arms by the Detroit Products Company.

Mr. Schapp: Q. Go ahead.

A. The sale of any competitive arm has interfered with the sale of our arms, and there is no question but what if we have the only arm on the market, that we would have all the business, and as any new arms were introduced or offered to the trade, they sold some of them, and that naturally interfered with the sale of our arms. The principal interference that I noticed during the sale of arms was when this arm, this one here (indicating) came out.

Q. Which one? A. This one (indicating).

Q. Exhibit D?

A. Exhibit D. When that came on the market, why, it was called to our attention by a number of our customers because we had, as far as I know, introduced these three Stimsonite reflectors, and had sold a great many jobbers throughout the eleven States and on our various trips around the territory they told us about this arm brought out by Detroit, which also had three reflectors, and I would say definitely that [227] the introduction of this arm, Exhibit D, interfered substantially with the sale of this one, Exhibit C.

Mr. Schapp: That is all.

(Deposition of Wallace R. Lynn.)

Cross-Examination

By Mr. Naylor.

Mr. Naylor: Q. Now, Mr. Lynn, on direct examination you were speaking in a number of instances about a Magarian arm or more than one Magarian arm which had been manufactured by him and sold by you prior to Plaintiff's Exhibit C, is that correct? A. Yes.

Q. Do you have samples of your arms in your custody or control? A. I think we have, yes.

Q. Do you have any catalogue pages showing the various arms to which you had reference?

A. Yes.

Mr. Naylor: I would like the record to show a demand that samples of the various arms and the catalogue pages be produced by this witness, and that he be subject to further examination concerning them.

Mr. Schapp: Have you them anyplace?

A. I can take time out here and call the office and see if they are there. Do you want me to do that?

Mr. Naylor: Yes, I would like you to do that.
(The witness talked on the telephone.)

The Witness: We clean out the office about every year and a half or two years. You will have to check back on that. I do not believe we have got them. We apparently have either sent them back to Magarian or given them away or busted them up or [228] something. I am not even sure that we

(Deposition of Wallace R. Lynn.)

can find the sheets. My secretary thinks she can find the catalogue page, but as new models are introduced, being in the sales end, why, we tore them out of our books, and I haven't got them. It looks to me like it would be Magarian's job to put that stuff out.

Mr. Schapp: Q. However, as I understand, you phoned your office and asked them to make a search for either arms or catalogues?

A. That is right. Our business setup, I suppose, is as any other manufacturer's agent: We represent a number of manufacturers and we have a room for samples, a separate room, and in that room we keep the current samples, and any obsolete or discontinued models we pile up once a year and dump them, return them to the manufacturer or sell them out, get rid of them. We haven't got room for any of the old stuff.

Q. As I understand it, you first met Magarian, the plaintiff in this action, about March or April 1935?

A. Yes, March, April or May.

Q. Sometime subsequent to that meeting you then undertook the sale of some of his products?

A. Right.

Q. How soon after that first meeting did you start selling his products?

A. Within sixty or ninety days after our first meeting.

Q. That would take us down into, say, roughly, June, or about that time, would it?

(Deposition of Wallace R. Lynn.)

A. No, I would say probably within sixty or ninety days—sometime in July or August.

Q. July or August of 1935?

A. That is right. [229]

Q. Am I correct in my understanding that Plaintiff's Exhibit C, at the time you commenced selling articles for Magarian, was not included among those articles? A. No, it was not.

Q. How long was it before Plaintiff's Exhibit C was added to the line of goods you sold on behalf of Magarian, that is, how soon after you commenced selling for him did that article come into the line?

A. Upon recollection—and this is just strictly guesswork—I would say very shortly after, probably within another sixty or ninety days, or roughly—that is, six months, six to seven months after I originally started.

Q. Would that take us into 1936 or would it be the latter part of 1935?

A. Either the latter part of 1935 or the early part of 1936. That is strictly guess work. Our records as well as Magarian's records will prove that definitely, but I would have to guess on it.

Q. You can, however, ascertain that information by reference to your records? A. Yes.

Q. Am I correct in understanding that you personally had something to do with the development of Plaintiff's Exhibit C?

A. With the development?

(Deposition of Wallace R. Lynn.)

Q. Yes. A. No.

Q. Was it handed to you as a finished product?

A. Well, yes, I would say it was handed to us as a finished product.

Q. Was it in the form in which you now see it here in evidence as Plaintiff's Exhibit C?

A. Approximately the same. I [230] don't know whether it was exactly the same or not, but I think it was.

Q. Do you recall any differences, any specific differences, between the arm in evidence here as Plaintiff's Exhibit C and the form in which it was when first added to your line?

A. I don't recall any differences.

Q. What about the windows, I mean the reflectors? Were those glasses always the same color?

A. Oh, no, no.

Q. That would be a difference then, wouldn't it?

A. That would be a difference.

Q. Would you elaborate a little bit on that difference, Mr. Lynn? A. Well, we used red.

Q. Can you fix the time when red was used?

A. For the rear. I am going to change that. I don't know. We changed it at the suggestion of Sharkey—that "we" by the way is strictly an editorial "we." Sharkey made the suggestion. I think there was a change in the Motor Vehicle Code where they felt amber had a greater visibility, and it was at their suggestion that Magarian changed it.

(Deposition of Wallace R. Lynn.)

Q. Was that change specific to Magarian's product or was it general to the trade?

A. I think it was general to the trade.

Q. That yellow or amber be used? A. Yes.

Q. Was that for the rearwardly reflecting buttons?

A. The what?

Q. The rearwardly reflecting buttons [231]

A. It was for both the rear and front.

Q. Both rear and front? A. Yes.

Q. In other words, as I understood it, first they had red buttons in the back? A. That is right.

Q. That is what I meant by rearwardly.

A. Yes, I understand what you meant there. I was just trying to think. It seems to me at first they insisted that we use red to the rear in line with tail lights and other signals.

Q. Can you recall what the ruling was at that time, at the time you first started selling Plaintiff's Exhibit C for Magarian?

A. I can't recall, no.

Q. But you do definitely recall at one time red buttons were used? A. Yes.

Q. And what were the front buttons?

A. The front buttons were yellow or white or cream colored buttons. You see, the cataphoto button was a kind of clear button with a yellowish cast, a yellowish-greenish cast, and they were available in a number of colors. But, as I recall, that first button that we had was a white or amber color

(Deposition of Wallace R. Lynn.)

button to the front and a red button to the rear, and then we had the round reflectors and a couple of buttons, and in practically all of the early arms those buttons and reflectors to the rear were red and those to the front were amber, yellow, or the color as approved by the Motor Vehicle Department.

Q. Some contrasting color generally, wasn't it, the front button?

A. Contrasting to what? [232]

Q. To the back buttons.

A. That is right.

Q. Was the change, as you recall it, from red rear buttons to amber rear buttons just a one-step change or were other colors tried in between the two?

A. As far as I can recall, there were no other colors tried. When the suggestion came from the Motor Vehicle Department, I think it was to change to amber, I would say from recollection only that it was a one-step change.

Q. That is, from red to amber? A. Yes.

Q. Did you try any different shades of amber or did you select the one that we now see?

A. There is a variable in glass always and there is very definitely a variable in the shade of amber, just as there is a variable in the shades of red or anything else. We have variables. You buy 100,000 of those reflectors, and from one barrel to another, if you are color minded, you will see

(Deposition of Wallace R. Lynn.)

differences in the glass, which cannot be controlled by the arm signal manufacturer and I question if it can be controlled by the glass manufacturer.

Q. Aside from the trade problem of variables, there are, however, specifications for different shades of amber, aren't there?

A. From whom?

Q. From the glass manufacturer, light, dark, and intermediate shades?

A. Yes, I think there probably are—light, light amber, dark—I don't know. I don't know about the glass manufacturers' specifications.

Q. Do you recall in conjunction with Exhibit C, in the progression [233] from red rear buttons to the amber buttons, any attempts or any trials of shades of amber different from that which we now see in Plaintiff's Exhibit C?

A. Yes, yes, that was at the Motor Vehicle Department's suggestion, and I know in making their photometric test over in Berkeley, and in the actual road tests on the highway, that various shades and shapes of reflectors were tried out very extensively.

Q. Did you attend some of those tests?

A. Oh, yes.

Q. And were the resulting suggestions from the Highway people specific to Magarian or were they general to the trade?

A. They were general to the trade. There was no—the Highway Department, to my knowledge

(Deposition of Wallace R. Lynn.)

anyway, has never been specific to any one manufacturer. They couldn't be. I mean in the very nature of the setup, they would be right on the spot if they did. They have been very, very fine in their cooperation, and they have also, when an improvement came along, I think everybody had a shot at it immediately.

Q. In other words, they conduct these tests and then disseminate the conclusions they reach as information for the trade?

Mr. Schapp: I object to putting in too much testimony about the workings of the Highway Department. It has nothing to do with the case. It is immaterial and irrelevant, not proper cross-examination.

Mr. Naylor: What was the last question?

(The reporter read the question.)

A. Anybody can attend these tests. I mean there is nothing [234] secret about them.

Q. Do you recall when you first attended one of those State Highway tests in conjunction with Magarian arms?

A. No, I do not, but it was before the Motor Vehicle Code was revamped. I know that. Before the Legislature had passed the new Code, or the Code supposed to be new at that time.

Q. Were they testing any particular Magarian arm at that time?

A. No, they were testing various types of reflectors for visibility.

(Deposition of Wallace R. Lynn.)

Q. They did not test any of the arms, as you recall it?

A. No, they just had pieces of wood and they took out these reflectors or fastened them onto the wood. The tests, the actual photometric tests of the arm were made at the University of California in the laboratory.

Q. Do you recall any specific reflectors that were used in those tests?

A. Yes, a great many.

Q. Could you describe them for the record?

A. Well, yes. There was the Libbey cataphoto button, and there was the cataphoto truck type reflector, and there was the Persons, and there was the K. D.—well, any number of reflectors.

Q. For arm signals, were they?

A. No, they were for all types. It was in conjunction with this Motor Vehicle—they did not specifically apply to arm signals; they did later, but the purpose was to establish the best type of reflector for a number of purposes—for clearance lamps, truck, rear warning signals, arm signals, and all the various safety [235] devices that were being considered at that time.

Q. Now, can you fix the date when you attended the first test?

A. No.

Q. You can't fix that date?

A. No.

Q. Could you fix the date when you attended any one of these tests?

A. Not a definite date, no.

Q. By year? Could you give us the year?

(Deposition of Wallace R. Lynn.)

A. I could give you the two years—it was either 1935 or 1936.

Q. Possibly both? A. Possibly both, yes.

Mr. Naylor: I think that is all, subject to production of the catalogue sheets. I shall have further questions of Mr. Lynn at that time.

(Thereupon counsel for the respective parties proceeded to take the deposition of Thomas A. Mitchell, after which Mr. Lynn produced the documents referred to, and the following occurred:)

Mr. Naylor: Q. As I understand it, Mr. Lynn, the results of the search of your files at the office have produced certain catalogue sheets, have they?

A. I think so, yes. They are there (indicating).

Q. Have you them here?

A. Yes, found two old sheets.

Mr. Naylor: I will ask that these two sheets be marked Defendants' Exhibits G and H for identification respectively.

(The documents referred to were thereupon marked Defendants' Exhibits G and H, respectively.)

Mr. Naylor: Q. Mr. Lynn, can you fix a date for Defendants' Exhibits G and H for identification? [236]

A. I can't fix a definite date, but in checking through our old records these sheets were found, and apparently filed in our files in 1936.

Q. Now, which of the two came first, if you know, of course, and in that connection perhaps I

(Deposition of Wallace R. Lynn.)

can offer this much assistance by a further question: Do the code names and the type numbers offer you any suggestion in that regard as to which of the two exhibits for identification came first?

A. No, they do not. The code names do not indicate which came first, but my guess is, and it would strictly be a guess, that Exhibit G came first—I mean were printed first.

Q. Exhibit G?

A. Yes, that would be a guess.

Q. Can you state how long it was after Exhibit G first came to your attention before you saw Exhibit H for identification?

A. No, but it was shortly after, I think. I couldn't tell. It seems to me as though these sheets may have come out at about the same time, and what makes me think that now is I believe we used Defendants' Exhibit G for general mailing and Exhibit H as a catalogue, insert sheet for jobbers' catalogues. I am not able to tell—I believe that H refers to the complete assembly, which includes the arm, the mechanism, and the control, and that G shows the individual items broken down as separate units.

Q. Do the list price figures suggest that to you? Is that what you had reference to?

A. The list price figures indicate that and also seem to confirm the fact that G was issued first and H came later, because we raised those prices.

(Deposition of Wallace R. Lynn.)

Q. In the search that you caused to be made this morning were your assistants at your place of business able to locate any physical specimens of the arms shown in Defendants' Exhibits G and H for identification?

A. No, couldn't find them.

Q. So far as you can recall, do Defendants' Exhibits G and H for identification correctly show the arms which you had for sale?

A. Yes. As a matter of fact, I think that the picture on Exhibit H is a photographic reproduction made from an actual photograph of the product. I am not so sure about G, whether that was a drawing or a photograph.

Q. How do the arms, signal arms on Defendants' Exhibits G and H for identification, compare with the first arm that Magarian exhibited to you after your conversation with him in March or April 1935?

A. How do they compare?

Q. Yes. A. They may be the same, as far as I can remember. I do not know whether we had this one first or whether we had the button type first, but it seems like this is the first arm he made. That is my impression.

Q. You took on the sale of that within sixty to ninety days from your first conversation with Magarian?

A. Yes, certainly, no later than sixty to ninety days after, my first conversation with him, and probably sooner than that.

(Deposition of Wallace R. Lynn.)

Q. Did you have the eleven Western States from the very beginning in your representation of Magarian? A. Yes.

Q. Did you personally call on the trade in those territories? A. Yes, sure. [238]

Q. Did you have any additional salesmen?

A. Yes.

Q. How many? A. Five.

Q. Who were those salesmen; could you name them?

A. There have been some changes since that time, but—do you mean the starting salesmen, the men who were with me at the time we took on the Magarian arm?

Q. That is right.

A. Well, there was K. A. Brooks, and I am not so sure about these other fellows, as to whether they were there at the start or not, but if they were not there at the start, they certainly sold a lot of arm signals. There was C. C. Fortride, and Warren L. Mills, and Ralph G. Reimers—that is all that I can think of. We have more than five men in our organization, but not all of them were actively engaged in the sale of arm signals. I personally took the arm signal and opened most of the accounts myself, and then those accounts where, for one reason or another I didn't get to see them or didn't complete the sale, and the boys followed up; but I would say that most of the original accounts I opened personally.

(Deposition of Wallace R. Lynn.)

Q. Are some of those men still employed by you?

A. Yes.

Q. And where are they resident, in San Francisco or elsewhere?

A. No, one lives in Portland and the other lives in Los Angeles, and I have replaced the other two—well, I have four men in addition to the other two now.

Q. What is the name of your Los Angeles man?

A. K. A. Brooks.

Q. Is there anyone in your local office in the sales line who [239] was with you at the time you took on the first of the Magarian products?

A. Only myself. I do not think any other salesman here except myself.

Q. For the sake of clarity on the record, Defendants' Exhibits G and H for identification, as I understand it, represent the only catalogue sheets which the search made this morning was able to produce, is that correct, Mr. Lynn?

A. The only old ones. We have current sheets.

Q. I mean the old ones. A. Yes.

Q. And this conversation is related to Plaintiff's Exhibit C. Would you like me to restate that question so it ties in?

A. These sheets have nothing to do with Exhibit C.

Q. Right I am speaking of the period prior to Exhibit C. A. Yes. That answer applies to prior

(Deposition of Wallace R. Lynn.)

to the introduction of Exhibit C or the appearance of that on the market.

Q. If there were any other signal arms, Magarian signal arms, in addition to those depicted in Defendants' Exhibits G and H for identification prior to Plaintiff's Exhibit C, would there be any sheets gotten out on those?

A. I do not know. I don't remember, but I would think so. We did not make many arms with the buttons on them. I do not know whether we got out a sheet or not.

[Endorsed]: Opened and filed Aug. 1, 1940. [240]

WALLACE R. LYNN,

called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Mr. Schapp: State your name to the Court?

A. Wallace R. Lynn.

Q. If your honor please, Mr. Lynn's testimony was taken before by deposition, and it was agreed the deposition might be introduced in evidence, but I would like to ask Mr. Lynn a few questions.

The Court. Proceed.

Q. Mr. Lynn, do you know Mr. Magarian?

A. Yes.

Q. What are your connections with Mr. Magarian?

(Testimony of Wallace R. Lynn.)

A. I represent him as salesman in the eleven Western States.

Q. Where do you reside?

A. In San Francisco.

Q. Is your place of business in San Francisco?

A. I have an office here and one in Los Angeles.

Q. Where is your office in San Francisco?

A. 2048 Market Street.

Q. Can you explain the general line of business you are engaged in?

A. I am a manufacturer's representative. We represent manufacturers of automotive, hardware, electrical and radio lines, when I say "we", I have other men in my employ, they do the same type of work, I do. We call on wholesalers, chain stores, and manufacturing plants, selling and soliciting business for lines we represent. [100]

Q. Among other things, you handle the signal arms of Mr. Magarian? A. Yes.

Q. How long have you been connected with Mr. Magarian?

A. I think since the early part of 1935. I think when I had my first contact with him, I think we started selling along in September, 1935. I would have to check up, though, I am not sure about that.

Q. Mr. Lynn, I will show you a signalling arm, marked Plaintiff's Exhibit A, and will ask you whether you have seen this arm before, or one like it? A. Yes sir, I have.

Q. Where have you seen that arm before?

(Testimony of Wallace R. Lynn.)

A. I have seen it a great many places, I have sold it and seen it manufactured. I have seen it in the plants and I have seen it on trucks.

Q. Can you identify this arm, as to who manufactured it? A. I can identify this type.

Q. Have you been selling it?

A. Yes, we did sell this arm.

Q. For Mr. Magarian? A. Yes.

Q. I will now show you, his second signalling arm, marked Plaintiff Exhibit C, will ask you whether you have seen this arm before and what you know about it?

A. Well, this is the arm that followed after this one. I have seen it before, certainly, we have sold a good many.

Q. Who manufactured this arm?

A. Mr. Magarian, the Industrial Scientific Company.

Q. Are you selling that arm for Mr. Magarian?

A. Yes.

Q. Could you approximately establish the time when you began selling that arm for Mr. Magarian?

A. This arm?

Q. Exhibit C?

A. It would be rather hard for me to guess on that. It would be strictly a guess. We started selling it as soon as Mr. Magarian had it ready for sale, whenever that was, that should be easily established by the factory records. I don't know whether [101] it was the middle of 1936 or the first

(Testimony of Wallace E. Lynn.)

part of 1937. I really couldn't tell you, as soon as it was ready for the market.

Q. Could you tell me in what sequence those arms were sold?

A. This one (indicating) was sold before. This was the first arm we sold.

Q. Now, I will show you a third arm, marked Plaintiff's Exhibit E, and ask you whether you have seen this arm before, and what you know about this arm?

A. Well, this is the Detroit arm. I have seen it before, seen arms of this type before.

The Court: What was that exhibit?

Q. Have you seen that arm before on the market?

The Court: Is that Plaintiff's Exhibit E?

Mr. Schapp: That is right.

The Court: How do you describe that?

The Witness: This is the Detroit Products Company arm.

Q. Have you seen that arm before on the market?

A. Yes sir.

Q. Where have you seen it on the market?

A. I have seen it in wholesale houses, more specifically Western Auto Supply Company, or some of the jobbers. I have seen it on trucks.

Q. I will now show you an arm marked Plaintiff's Exhibit D, and will ask you whether you have seen that arm before?

A. Yes sir.

(Testimony of Wallace R. Lynn.)

Q. What do you know about it, where have you seen it?

A. I have seen this arm around in the trade and on trucks.

Q. Now, Mr. Lynn, you are probably familiar with the main facts of the present controversy, it concerns a patent, a patent granted on Plaintiff's Exhibit D, and let me ask you, whether you know anything about the development of this arm, which the plaintiff claims is his invention, do you know anything about this development of this arm by plaintiff?

A. Well, I know that he worked hard on it. I know that he spent considerable time in various [102] designs in an effort to work out an improvement over the old arm. I had no active part in the actual design or development, that was his job. I know he worked on it for some months prior to the time it was ready in its finished form for sale, that is about all.

Q. Did you have any conferences with Mr. Magarian about the different problems involved in the manufacture of the signalling arm?

A. We had a number of conferences, during that period. He came up here and I was down there, discussing sales problems and the arm. We had any number of what you might term general conferences in which a great many subjects were covered, but during the development of the arm or while he was designing that one, we naturally, myself and other

(Testimony of Wallace R. Lynn.)

fellows, saw the various ideas. He had a number of ideas he was attempting to work out at that time. This was the final result.

Q. Calling your attention to the first Magarian arm, Plaintiff's Exhibit A, and the patented Magarian arm, Exhibit C, are you familiar with any particular problems that the plaintiff tried to overcome in the development of the second arm from the first arm?

A. Yes, he wanted—one point was to make it more visible at night, to make it a more efficient signal arm, so that it would act as a more effective warning sign at night.

Q. You, no doubt, are familiar with signal arms in general? A. Yes.

Q. You have a pretty good engineering education?

A. Only from experience, I have no engineering education.

Q. You have handled signalling arms for the last five years? A. That is right.

Q. You have seen many signal arms on the market? A. Yes.

Q. Could you point out, to his honor, just what differences, you see between these two signalling arms in their general effect?

A. The main features of this arm, over the first arm are the fact [103] that the actual inches of reflective area are considerably greater. In this one at night, when the headlights, that are approaching

(Testimony of Wallace R. Lynn.)

from either the rear or the front, it stands out brighter. It is a different type of reflector, this is a stimsonite lens, and it is lighter. I believe it is lighter in weight, it is finished a little better, they improved the finish considerably on the arm. I believe those are the general points. It is more efficient in every way. It is lighter in weight, it has a higher reflective area on both sides, considerably more. I believe those are about the only points I know of. Is there anything special I haven't covered.

Q. No.

A. It is better made all the way around, it is stronger, it has a higher reflective area, I think that is about all I could say.

Q. Would you consider this more attractive to the trade and easier to sell?

A. I think so. It is very well received by the trade. It is just my opinion, in every detail it is a better arm than the first one there.

Q. When did you first place this on the market, as I understand it, you handle all sales on the Western States?

A. We started from the time he started, I think we handled all the sales, in fact I know we did.

Q. Did you notice any difference in the sales volume or ease of selling, when you introduced this arm instead of Exhibit A.

A. Our sales increased very substantially.

(Deposition of Wallace R. Lynn.)

Q. Now, you know, of course, the Detroit Manufacturing Company? A. I know of them.

Q. You know of them as big competitors of Magarian? A. Yes.

Q. Do you know whether there are other manufacturers? Of signalling arms in the Western area?

A. There are a number of manufacturers of signalling arms, and I think there are several in this western [104] area, I don't know of anyone specifically, however.

Q. Could you generally give us an estimate of who the bulk of the signalling arms is handled by?

A. You mean what firms sell the bulk of all signalling arms? The Industrial Scientific Company and Detroit Products Company, I think between the two of us, we've got ninety per cent of the business.

Q. Now, you said you had seen Plaintiff's Exhibit E and Plaintiff's Exhibit d, on the market. Could you approximate the time when these two exhibits came on the market?

A. No, sir, I could not. The one with three reflectors came first, at least I saw it first and the one with the two reflectors is their present type, as I know it.

Q. What would you say comparing the two exhibits D and E with Plaintiff's Exhibit C, as to the similarity and sales appeal of the signalling arm?

Mr. Naylor: I think the exhibits really speak for themselves on that, your honor.

(Deposition of Wallace R. Lynn.)

The Court: Objection overruled. You may answer.

A. Well, I think there is a great similarity between Plaintiff's Exhibit E—is this Plaintiff's Exhibit E?

Q. That is Plaintiff's Exhibit E?

A. Is this Plaintiff's Exhibit C here? I think there is a great similarity between Exhibit E and Exhibit C.

The Court: You think they have the same sales appeal?

A. I think that the average man would find difficulty in telling the difference, if he saw them one at a time. If you took a truck driver and showed him this one and put it away and took out this one, I don't think he would know, on quick presentation, which was which. We found in our sales, that when this one came out——

The Court: What is that? [105]

A. This Detroit arm that they got a lot of business on. They got it in some cases from some of our customers, who were buying this arm.

The Court: Buying what exhibit, is that?

A. They were already buying Exhibit C, they bought these just more or less—they said it didn't look any different to them, it looked like the same arm, did the same thing; some liked the finish better on this, liked the paint job. They had various comments to make. In the case of larger buyers, they

(Testimony of Wallace R. Lynn.)

moved where they could get a better deal for themselves.

Q. How about Exhibit D?

A. Well, Exhibit D, of course, is the same shape, almost exactly the same shape as the other two. The only difference is it has the two reflectors on each side instead of three. It certainly, in appearance, is similar in shape, but is, certainly different in the fact it has two instead of three reflectors. They are longer than the others, so that it is not as easily confused, certainly, as these two others.

Q. Mr. Lynn, have you run across any particular instances where some of your customers, who had been in the habit of buying your signal, or rather the Magarian signal arm changed over to the Detroit arm?

A. Yes, we have had a number of those instances.

Q. Can you relate any particular instances?

A. Yes, Western Auto Supply Company in Los Angeles is one, and there are—I think I would have to guess because I haven't made any check of that, but there are a number of accounts that have bought Detroit arms and have bought ours.

Q. Who is the Western Auto Supply Company?

A. It is a chain store organization with headquarters in Los Angeles, operating some two hundred and fifty stores in the states west of Colorado and west. They do a tremendous automotive busi-

(Testimony of Wallace R. Lynn.)

ness in all automotive supplies [106] a very substantial account.

Q. Were they some of your best customers?

A. They were one of our best customers, and for that matter they are still a good customer. They bought our arm for all their stores for some time, they also bought some of the arms from Detroit. They bought the three reflector arm and did a big job on it throughout their entire chain. Later on they split the business. They gave over the California business to Detroit. We still have the business in Oregon and Washington. We lost the Colorado business because, so we were told, by the buyer in Denver and in Los Angeles, that they paid the freight where we didn't pay the freight at that time. It made a difference in the landed cost in Colorado. Later on, we met that by paying the freight.

Q. Did they sell then, buy then, your two window arm as well as the two window arm from Detroit. I want to find out whether the Western Auto Supply Company bought the two window arm from Detroit Manufacturing Company as well as the three window arm?

A. I can't tell you that, I don't know. I think they are buying it now. I think that is the current model of Detroit arm and if it is they are buying it.

Q. Did any of the purchasers of Western Auto Supply Company ever express an opinion as to the difference between the arms or their similarity?

(Testimony of Wallace R. Lynn.)

Mr. Naylor: Objected to as hearsay.

The Court: That is hearsay.

Mr. Schapp: That is all, Mr. Lynn.

Cross Examination

Mr. Miller: Mr. Lynn, when you testified in the deposition that was taken—do you recall testifying at that time? A. Yes.

Q. You made some mention of having something to do with tests made [107] on reflectors or lenses used on signal arms?

A. Not specifically on signal arms, on all types of signal devices but it covered reflectors generally.

Q. Those tests were conducted where?

A. On the highway at night.

Q. By whom?

A. Bill Sharkey and men in the Motor Vehicle Control.

Q. Is Mr. Sharkey with the Motor Vehicle Control of California? A. Yes sir.

Q. Were you present at that time?

A. Yes.

Q. When was it those tests were conducted?

A. I couldn't tell you.

Q. Was it 1935?

A. I don't know. It was 1935 or 1936, yes.

Q. You put it in one of those two years?

A. It was at the time the Motor Vehicle Department of the State was being revamped, they were going to put in certain modern improvements in the Motor Vehicle Code to improve safety. They

(Testimony of Wallace R. Lynn.)

were checking reflectors for the back of trucks, lights, arm signals and a great many things. At that time we represented not only Mr. Magarian but we represented Libby Catafote Company or whoever manufactured these catafote reflectors. It was through that original contact in testing reflectors and signal arms and visibility and reflecting areas, that I worked with Mr. Sharkey. On the testing, I was merely there for observation in checking.

Q. Was that about the time when the State Officials of the State Highway Control began enforcing the requirements that trucks carry signal arms?

A. It was prior to that time, it was prior to the time the bill was passed by the legislature.

Q. About how long prior.

A. I couldn't tell you. It was during the test period which extended over a number of months.

Q. And did the type reflector that is shown here in Plaintiff's Exhibit A, was that subjected to a test at that time?

A. I couldn't [108] answer that either.

Q. You don't recall that particular type of reflector being subjected to tests?

A. Reflectors of all sizes, ranging from little tiny roadside buttons up to reflectors ten inches in diameter were tested. It covered such a range of reflectors that I couldn't say specifically, that this one was tested. It would be my assumption that it was because a great many reflectors were tested at that time.

(Testimony of Wallace R. Lynn.)

Q. How much time did you spend with the officials of the State Highway Patrol in observing or participating in these tests?

A. Oh, possibly eight hours.

Q. Eight hours? A. Yes.

Q. And were any conclusions or recommendations made at that time, at the conclusion of the test? A. No.

The Court: What has this got to do with the case? Why are you offering this evidence?

Mr. Miller: Because some testimony along that line was asked in this deposition that has been offered in evidence. I want to explore that a little bit further.

The Court: How is it material?

Mr. Miller: On the question of the recommendation of the State Officials as to the size of the lenses.

The Court: How can that aid the court in any way in determining whether or not this patent is valid or infringed?

Mr. Miller: I wanted to bring out several features. One, that enforcement of the State Code began in 1935; that naturally caused an increase in the sales of these signalling arms. Another thing is that the State officials saw these tests and came to the conclusion that the signal arm should have a large reflecting area on it. This suggestion came from the State not from Mr. Magarian [109] that the size of the reflector on the arm should cover as

(Testimony of Wallace R. Lynn.)

large a percentage of the arm as reasonably possible.

The Court: I still am unable to see how it is material.

Mr. Naylor: I think I can clear one phase of that point out. The plaintiff has offered a tabulation of his sales this morning, in 1935 to date, for the purpose on his prima facie case of showing it was public response to his article that caused the sales increase. We think we should be entitled to show through the questioning of Mr. Lynn that the market was created by the enforcement of the Act and anyone in the market would have an increase in sale because of enforcement, not because of superiority in the article, they had for sale.

The Court: You may proceed.

Q. Do you know whether or not the State did begin a rigid enforcement of the act in the years 1936, 1937 and 1938?

A. They began shortly after the Motor Vehicle Code became a law, that is the new one. I believe it was on September 1, either 1935 or 1936. I am inclined to think it was 1935. They did for several months. I wouldn't say it was rigid, it has never been what it should be.

Q. But there was a marked increase in enforcement about that time?

A. It was the only enforcement they had—they ever had. It was a brand new law.

Q. In making these tests were any of the re-

(Testimony of Wallace R. Lynn.)

flectors or reflecting devices rejected by the State as being unsuitable? A. Any of ours?

Q. Of any kind?

A. I wouldn't know that. You didn't get a recommendation or the determination. The tests were made in the university by Professor Bender. The road tests were made by Sharkey of the Motor Vehicle Control. It was done the way that any of these things are approved. Professor Bender passes on the laboratory, photographic tests, Sharkey determines whether they met the [110] Motor Vehicle Code, then they accepted or rejected according to their two findings. The manufacturer and the interested parties have nothing to say about whether it shall be accepted or rejected. They can follow their suggestions or offer new ones but the final decision rests with the Department.

Q. Was this arm, Plaintiff's Exhibit A, submitted to Mr. Sharkey or the Control for acceptance or rejection?

The Court: I think he has already answered that. It's been approved. He said he didn't know what specific arms were exhibited or tested but he assumed that arm was there when the tests were made, isn't that so?

A. Yes.

The Court: Did you submit it?

A. No, sir.

Q. Now, you say you lost some of the business to the Western Auto Supply in the Magarian arms, is that correct?

(Testimony of Wallace R. Lynn.)

A. You say we lost some of it? Yes, I wouldn't say we lost it, they elected to buy the Detroit arm in certain sections of the territory, for what they told us, was price and equal appearance. They said the arm looked the same and the price was better.

Q. Did they make any complaint or comment about the superiority of the paint job?

A. They made comment about our paint job, they thought the finish of the paint job on the Detroit signal looked better. That was one man's opinion and frankly, I thought he was mistaken because I thought the finish on our arm was superior to theirs.

Q. At that time, do you know whether he had in mind the Detroit arm of Exhibit E or D, like this one?

A. At that time it was the one you have in your left hand, with the three buttons.

Q. That is Exhibit E. I will show you Defendant's Exhibit M, you recognize that arm?

A. I don't recognize that arm. I have seen arms similar. [111]

Q. Have you seen any arms which you would say were duplicates of that?

A. No, I couldn't swear to that. I have seen so many arms, I have seen arms that looked like it. I couldn't say I have seen an exact duplicate of it.

Q. How about this Exhibit M I now hand you, have you seen anything like that before?

A. Yes.

(Testimony of Wallace R. Lynn.)

Q. Do you recognize that as being a Magarian arm? A. Yes sir.

Q. When did you see that first?

A. I couldn't tell you the date or even the approximate date. We sold these buttons—I believe that is our catafote buttons, we sold them to Magarian. I couldn't say when I saw that arm, as I told you, we represent Libby Catafote Company, and I think we sold those buttons or at least, certainly, we sold part of them to Magarian. I believe that arm was in between the one with the round buttons.

Q. This one, you mean (indicating)?

A. I think that is number 1; this is just my recollection. I think that is number 1 (indicating) I think the one with the catafote buttons, we call them catafote buttons, I think that was number 2. I maybe wrong, maybe that is first.

Q. Exhibit A is referred to as number 1 and Exhibit N is the exhibit referred by the witness as number 2.

The Witness: Yes. I would have to qualify that and check up a little because I don't know, which one was first or second if that means anything to you.

Q. Do you recall why the change was made from the round reflector in Exhibit A to the catafote buttons?

A. No, I believe however that the change was to try and get more visibility, a constant effort to improve visibility so that these things would be

(Testimony of Wallace R. Lynn.)

effective at night. That catafote button is of the same type that the Automobile Association uses on their highway signs. You have seen [112] them, on these signs that reflect when the light beam hits them. The State thought that they had better visibility than the flat type reflector, I believe, I am sure, that is the reason Mr. Magarian used them.

Q. In these highway tests was the Stimsonite reflector tested too? A. Oh, yes.

Q. That was approved by the State at that time?

A. Yes.

Mr. Miller: That is all.

MASICK C. MAGARIAN,

recalled as a witness on his own behalf. Previously sworn.

Mr. Schapp: I would just like to ask one more question. Mr. Magarian, referring to this memorandum or summary of abstract from your books, will you please advise the Court, how many signalling arms you sold between August 1936 and the end of the year 1937? A. August, 1936?

Q. August, 1936 to the end of the year 1937?

A. You mean August inclusive?

Q. Inclusive, yes.

A. I see, if you want the exact total——

Q. Approximately?

A. Well, from August to December, 1936 in

(Testimony of Masick Magarian.)

round numbers, I would say a little over three thousand. Then in 1937 a tabulation is given for the twelve months, as 18832. I would say it is over—well, it would be over twenty-one thousand.

Q. The total would be around twenty-one thousand? A. Yes.

Q. And were those arms all the patented signalling arms or would they include some of the older arms manufactured by you?

A. Well, after we had our new arm out, we had a small stock, in fact we tried to clean up all our stock at the time we introduced the new arm. We did have, I am sure, perhaps two or three dozen of the old type. However, practically all of it, you might say ninety-five or ninety-eight percent represents the new type arm, we manufacture now. [113]

Mr. Schapp: Thank you, that is all. At this time, I will ask that the pamphlet of Industrial Scientific Company, that your Honor has been looking, be introduced for identification and marked Plaintiff's Exhibit U for identification.

(The pamphlet was marked Plaintiff's Exhibit U for identification.)

Mr. Schapp: That is all for the Plaintiff, your Honor.

Mr. Naylor: If the Court please at the opening of defendant's case, we will call T. A. Mitchell, who is present in Court, and ask him a few questions concerning his representation of the defendant.

THOMAS A MITCHELL,

called as a witness on behalf of defendant, being duly sworn testified as follows:

Mr. Schapp: If your Honor please, at this time, I would like to make a motion, before the testimony of Mr. Mitchell is taken. Originally I started this action on the assumption that Mr. Mitchell was purely an agent of the defendant company, and that the defendant company was the main party in interest. I am still convinced that that is the actual case, but the defendants apparently want to produce evidence which might tend to show a different state of affairs, which might make Mr. Mitchell responsible, in his own right, as an infringer of the patent, either independently or separately or as a joint infringer or possibly in the alternative. I would like to make a motion that I be allowed to join Mr. Mitchell as one of the parties defendant in the suit so as to make sure there won't be any question on the issues.

Mr. Naylor: I think that motion is brought rather tardily.

Mr. Schapp: As I understand the new rules, a motion of this character may be made at any time.

The Court: Very well, let that be the order.

Mr. Schapp: The parties are exactly the same, the issues will [114] remain the same. There has only recently been brought out a new angle.

Mr. Naylor: These parties are both residents of the Southern District. Mr. Magarian is in Fresno and the Detroit Products Company is in El Se-

(Testimony of Thomas A. Mitchell.)

gundo. The defendant has gone to a lot of expense——

The Court: You are making Mr. Mitchell a defendant for what reason?

Mr. Schapp: Principally to maintain the jurisdiction of this Court, in case the facts should be proven different from what they are shown to be in the affidavits.

The Court: What rule did you have in mind, that such a motion is permissible at any time?

Mr. Schapp: I have in mind Rule 21.

The Court: Yes, well now Mr. Naylor, if you think there is necessity of a continuance you are entitled to it.

Mr. Naylor: I know the Court's situation. I don't want to duly prolong this trial, beyond any necessary point, but I can't conceive of this motion being brought at this late stage.

The Court: Well, I will consider that in connection with the motion you will probably hereafter make relating to jurisdiction.

Mr. Naylor: That would be quite satisfactory with us, your Honor.

The Court: I think I should grant the motion but I will hereafter permit you to argue the question at whatever length you deem necessary and I will consider it in the aspect of your suggestions.

Mr. Naylor: That will be very satisfactory with me, your honor. All the matter will be before you at one time. In that event, it might be advisable to

(Testimony of Thomas A. Mitchell.)

ask Mr. Mitchell a few questions, as a foundation for the motion we do contemplate making.

Direct Examination

Mr. Naylor: Q. What is your name, please?

A. Thomas A. Mitchell. [115]

Q. Where do you reside, Mr. Mitchell?

A. 30 Tamalpais Terrace, San Francisco.

Q. Are you in business in San Francisco?

A. Yes sir.

Q. In what sort of business are you?

A. At the present time, as a factory representative and warehouseman.

Q. Do you operate that business as sole owner, or are you connected with someone else?

A. Absolute sole owner.

Q. Is it conducted under your individual name or some other name?

A. Under the fictitious name of T. A. Mitchell Company. No one else is interested in it but myself and never has been.

Q. What particular line of merchandise do you deal in?

A. Automotive supplies mainly, I have sold a few little odd lines but it would be automotive supplies in general.

Q. How long have you been in the business?

A. I started in San Francisco in 1916.

Q. Where is your present location?

A. 537 Turk Street.

Q. Have you always been located at that address?

A. No, sir.

(Testimony of Thomas A. Mitchell.)

Q. Will you state briefly where you were located prior to 537 Turk Street?

A. At the Tilden Sales Building, 440 Market Street and Number 7 Front Street, I was there four years.

Q. In other words, your business has always been in San Francisco, since 1916?

A. Yes, sir.

Q. How long have you been at the Turk Street address?

A. I have been there approximately five years.

Q. Will you describe the nature of the premises at 537 Turk Street, taking first to the exterior of the building?

A. Well, it is a glass front with windows; only one door entrance, an ordinary door. The width of the building, I think, is eighteen or twenty feet, eighteen feet inside measure and about eighty feet deep.

Q. Is there a display window?

A. Yes sir. [116]

Q. Will you describe very briefly the interior?

A. It is a room approximately eighteen by eighty feet deep, concrete floor, supposed to be a class A building. Do you mean the contents, such as shelving and merchandise or just the building?

Q. The building that is sufficient. I show you, at this time, a photograph and ask you if you can identify that?

(Testimony of Thomas A. Mitchell.)

A. Yes, sir, it is a photograph of the premises at 537 Turk Street.

Q. Of your store? A. Yes sir.

Q. Do you know who took this particular photograph?

A. Yes sir, my son Herbert Mitchell.

Q. State approximately when it was taken?

A. Oh, about two months ago, two or three months ago.

Q. Now, directing your attention to the fact that certain lettering appearing to be on the windows on the premises, will you please read the writing?

A. T. A. Mitchell Company, Factory Representative. On the small window to the side are the words "No Retail" the street number is on each window there.

Q. Has there ever been any change in the lettering on the window? A. No, sir.

Q. At 537?

A. That was put on there when we moved into the building.

Q. It's been that way for that period of time?

A. All that length of time, just as it is there.

Mr. Naylor: We will offer that as Defendant's exhibit next in order.

(The photograph was marked Defendant's Exhibit 0 in evidence.)

Q. Do you recall having a business transaction with a Mr. Birkelund N. Hansen?

(Testimony of Thomas A. Mitchell.)

A. Yes sir.

Q. Will you explain — do you recall about when that was Mr. Mitchell?

A. I couldn't give you the date just now. I really don't—I haven't [117] it in my mind.

Q. Has it been a few months, some months?

A. Some months I will say.

Q. Will you describe to the Court in what respects, if any, the exterior of your premises differ from the day on which the picture was taken and the day Mr. Hansen entered your premises?

A. The only difference would be the window display.

Q. Did you change the display on your window from time to time?

A. Yes, about every three or four weeks, something like that, sometimes six weeks.

Q. What do you display in the window?

A. Some of the products we warehouse.

Q. Have you ever displayed the products of the defendant Detroit Products Company in the windows?

A. Yes, sir, there's been some of their signals in there.

Q. Can you describe briefly how the signals of the defendant are displayed or would be displayed in your windows?

A. Well, as I recall, they laid right along the front here. (Indicating) I laid them at an angle, possibly one right on this little front space, and

(Testimony of Thomas A. Mitchell.)

one angling this way, one angling that way. That would be as near as I could testify.

Q. Has there ever been a time when the Detroit Products Company products were the only articles in the window?

A. No, sir, they have been in with other items always.

Q. Who pays the rent to the premises, Mr. Mitchell? A. We do.

Q. Does the Detroit Products Company make direct payments of the whole or any part of your rent? A. No sir.

Q. How many employees have you?

A. You mean employees or sons?

Q. Employees?

A. One employee and my son is associated with me too, if you want to call it that way. [118]

Q. What are the duties of these two employees?

A. The inside boy is shipping clerk and stock clerk, keeping the stock. My son acts as salesman for me.

Q. Is he always at 537 Turk Street or does he travel, in his capacity as Salesman?

A. He travels.

Q. Who pays the salary of the shipping clerk?

A. T. A. Mitchell Company.

Q. That's you? A. That's myself.

Q. Who pays your son's salary?

A. Myself. He works on a drawing account.

(Testimony of Thomas A. Mitchell.)

Q. How many lines do you represent at the present time, Mr. Mitchell?

A. Well, you mean as factory representative and warehouseman both? I would say about twenty or twenty-one lines, about that, the number varies.

Q. Have you always—you say it varies?

A. I let loose of some that are not prosperous and take on others at times, that are more successful. About twenty now.

Q. Will you describe briefly your method of operation?

A. Well, as factory representative, we solicit orders through our catalog and firms to make up our orders and send them to the factory. Those are sent directly to the customer, invoiced by the factory and the collections are made by the factory.

Q. You mentioned make an order, an order form, I will show you a paper and ask you to identify it?

A. Yes sir, that is a duplicate of our order blanks that we keep.

Q. How many copies of that particular type of order blank are made out by you?

A. Three. One we give the customer when the order is written, one we keep ourselves and the original goes to the factory.

Q. Will you describe briefly what transpires from that point, from the time you have mailed in your order form to the factory, do you [119] have anything further to do with the transaction?

(Testimony of Thomas A. Mitchell.)

A. No, nothing. In that case the factory makes shipment, invoices it to the customer and they do the collecting. Later on we are paid a commission on making the sale but we have nothing more to do with that except receiving our pay.

Q. That's on factory receipts?

A. That's on factory receipts.

Q. There is attached to the back of the order form which you have identified a single sheet, can you identify that?

A. That is the duplicate copy, in this case the Detroit Products Company sent to us a copy of the invoice they rendered to the customer.

Q. Did you have anything to do with the attachment of those two papers?

A. Yes sir, I pasted them together to make my record complete.

Q. That is part of your record?

A. That is part of my record.

Q. This is a complete specimen of a factory representing transaction as far as your record is concerned?

A. As far as my record is concerned, yes.

Q. I will offer it in evidence as defendant's exhibit next in order.

(The Documents were marked Defendant's Exhibit P in evidence.)

Q. Now, are there any other methods you employ in doing business for the factory?

A. As warehousemen, we fill orders from the

(Testimony of Thomas A. Mitchell.)

warehouse that would come in through the mail or telephone or by teletype and shipped from the warehouse, and in that event we make out triplicate copies of the warehouse delivery tag; the number 3 copy is given to the customer, the number one to the factory, who render an invoice to the customer and the second, we keep as our own.

Q. Will you please describe just what you mean by warehouse?

A. It is just for storage of merchandise for the purpose of distribution. We don't own any of it, it is there for distribution only.

Q. How extensive a space is it?

A. You mean my room? [120]

Q. Yes sir.

A. It is approximately eighteen by eighty feet, twenty by eighty, outside measurement.

Q. Is that wholly taken up by warehousing?

A. Except for the little office in the front. I have a little office in the front maybe ten by twelve.

Q. Do you carry large stocks for these various factories?

A. The stocks are for the purpose of emergency orders. The stock which we have here is for filling in emergency, pickup orders, we call them.

Q. You gave affidavits early in this case didn't you?

A. Yes sir.

Q. You represent the defendant, do you, Detroit Products Company?

A. We represent them, yes.

(Testimony of Thomas A. Mitchell.)

Q. What is your practice with the defendant, Detroit Products Company in filling orders from the warehouse stock?

A. Well, on small orders, say six, something like that, very small orders, they are filled possibly from the warehouse, if the customer asks it that way. On orders of a dozen or more, the orders go to the factory, and they are shipped from the factory.

Q. Have you established any set number on that?

A. Well, yes, twelve. The factory allows the freight on twelve, so naturally, buying that quantity prefers to have it when he buys it out of our place. He has to pay an additional warehouse fee.

Q. In connection with an earlier question and answer, I ask you if you can identify that paper as being part of your record?

A. Yes, sir this is an order my son took, on which, because of the size of the order we filled it out of the warehouse and shipped it to the customer at Hanford, California, ourselves.

Q. Will you describe the two sheets, do you find your order form there?

A. Yes sir, this is the duplicate copy of our order form.

Q. Do you find the factory invoice there?

A. This is our copy of the factory invoice. The original of the invoice went to the cus- [121]
tomer. Those are mailed to us, as a matter of record to show the order has been shipped.

Q. We offer that as defendant's Exhibit next in order.

(Testimony of Thomas A. Mitchell.)

(The documents were marked Defendant's Exhibit Q in evidence.)

Q. You mentioned a moment ago that in the transactions, in which you fill orders from the warehouse stock at 537 Turk Street, that a warehouse charge is made, will you please explain to the Court what you mean by that?

A. As a rule there is a five per cent warehouse charge added to the customer's invoice. The customer pays the factory; at the end of the month or at the end of the commission time, that warehouse fee is refunded to us to cover our shipping cost. It is usually a five percent fee.

Q. Five percent of what figure?

A. Of the net invoice price.

Q. So the factory tacks that five per cent on to its invoice and then remits that five percent to you as a warehouse fee? A. Yes sir.

Q. When the collection has been made, is that correct?

A. That is where we receive our compensation for the shipping and storage.

Q. Now, what is the significance, Mr. Mitchell, of the words "No Retail", which you say appear on one of the windows of your premises at 537 Turk Street?

A. That means we don't sell direct to the customers; orders that come in are billed to the jobbers. The individual might pick them up, but they are referred there by a jobber.

(Testimony of Thomas A. Mitchell.)

Q. What do you mean by a "jobber", will you explain that to the Court?

A. A jobber is a person who buys from factories, and resells to dealers. It is a wholesaling or jobbing business. They resell to dealers. That is the best explanation I can make.

Q. Are you personally acquainted among the jobbers in this metropolitan area?

A. Yes, sir, with most of them, virtually all of them.

Q. Is there ever a time when sales are made by you across your [122] counters, for cash, and if so, will you please explain the circumstances under which they occur?

A. Well, if a customer comes in, whose credit is not good, and has not been approved by the factory. We are obliged to sell to that customer on a cash basis. That is our instruction and that cash is remitted to the factory for the price of the goods they have bought.

Q. Now, does that occur in your sales to jobbers as a class?

A. There are a few jobbers whose credit is not good. We have a few we are obliged to sell to c. o. d.

Q. C. O. D. as far as you are concerned?

A. Yes.

Q. You collect the cash? A. Yes.

Q. And remit it to the factory?

A. At the end of the month we make a report of the miscellaneous cash sales and send it to the

(Testimony of Thomas A. Mitchell.)

factory.

Q. Is there any indication to the factory of the nature of the transaction, do you send them any record of any sort?

A. There is our regular warehouse delivery tag, which is headed as a miscellaneous cash sale, listing the number, the price of the item and the total is sent to the factory.

Q. I will show you a piece of paper and ask you if you can identify that?

A. Yes sir, that is a number two copy of our warehouse delivery tag.

Q. Is that such a tag as you have just referred to?

A. Yes, sir, this is a warehouse delivery tag for merchandise delivered out of warehouse.

Q. That would indicate, would it, a transaction over the counter, a C. O. D. transaction, would it?

A. Well, this was a peculiar case, because the customer came into the place and wanted to buy it. He didn't have any right to purchase it.

Q. By referring to the paper in your hand, would it be possible for you to recall the circumstances attending that particular sale? [123]

A. There were two men walked into the place, one asked me if I could sell him a signal arm like the one in the window. I asked him who he was, and he told me he was with some kind of a trucking and delivery company. I said this is a warehouse.

Q. Do you make a practice of asking for some

(Testimony of Thomas A. Mitchell.)

identification?

A. I don't sell anything to anyone that comes into my place that I don't know until they identify themselves. I told this man it could not be sold to him but if he knew a jobber, we could sell it to the jobber. He suggested Scovel and Sons and I said all right. He took the phone and called Scovel and Sons and talked for a minute and then the telephone was given back to me. Mr. Scovel gave me an order number, on which I could sell the man the merchandise, and also said to me to grant him a certain discount but to collect the cash because the man's credit wasn't good, which I could do. We got the arm out of stock, delivered it to him, made out a cash tag, as we call it, receipted the man for his money, and he took the arm and went out. Then later on, we made up this tag to send to the Detroit Products Company showing the transaction with Scovel and Sons. In other words we did make a record of having delivered the tag to the jobber. At the same time, we sent the usual third copy to Scovel & Son and we also send up the actual \$3.09 we collected, from the customer.

Q. You mentioned cash tag, can you identify that particular piece of paper?

A. Yes sir, that is the number one copy of the cash tag, we have. It is only in duplicate.

Q. Was that tag written by you?

A. The tag was written by the stock room boy, the actual ticket itself.

(Testimony of Thomas A. Mitchell.)

Q. Is there any writing on that?

A. There are notes, I made on it for my own reference.

Q. Will you explain to the Court the significance of the notes? [124]

A. I have written on here just what I did with the money, also the number of the warehouse tag. It was for my own notes that I wrote on there the number of this tag, for my own records, because I had the sales end of the tag at the end of the month. Then I mentioned this transaction was handled through Scovel & Sons, in fact their name is on top, by the way that order is shown here—the number of the order is 3114. They gave us that number when they made their tag out for the factory to handle. This shows I didn't pass the money through my cash book. This was a little unusual transaction. We don't usually collect money for the jobbers, we send the customer up for the jobber's order. When he comes back, we fill it for him and he either pays the jobber himself or settles with the jobber in his own way, because when he comes back with the jobbers order, we fill it.

Q. In that event, you have no collecting duty at all?

A. We have no collecting with that, at all.

Q. Now, on this particular transaction with Scovel & Sons, did you subsequently receive from Detroit Products Company, a copy of their invoice with Scovel & Sons, as you have previously de-

(Testimony of Thomas A. Mitchell.)

scribed is the practice?

A. Yes sir, we do for all of them.

Q. Can you identify this particular copy?

A. This is the copy they sent us of the invoice rendered from the Detroit Products Company to Scovel & Sons for the arm I sold to that man that day.

Q. I would like to offer these as a group exhibit, as defendant's exhibit next in order.

(Documents marked Defendant's Exhibit R in evidence.)

The Court: That includes the number 2 tag and the number 1 tag?

The Witness: It is the number 2 cash tag and the number 1 delivery tag, your honor, and a copy of the factory invoice.

Q. Do you make it a practice to list the names of the various [125] factories you represent at your premises, or in any way display the names publicly?

A. No, sir.

Q. By that, we understand that you don't have the firm names on your window?

A. No signs of any of them.

Q. Does that include Detroit Products Company?

A. That includes Detroit Products Company.

Q. Do the names of the various factories you represent, appear on your letterheads?

A. No sir.

Q. What about your bill heads?

A. Not on our bill heads.

Q. Do you know of your own knowledge whether

(Testimony of Thomas A. Mitchell.)

the Detroit Products Company keeps bank accounts in San Francisco?

A. I have no knowledge of that kind, no sir. The checks I receive are on Los Angeles bank accounts, they show that way.

Q. Do you know whether the name Detroit Products Company appears in the local San Francisco telephone directory?

A. I have never put it on there, I would say, no, it isn't in there.

Q. Now, a moment ago, speaking of salaries paid to your employees, that is your shipping clerk and your son? A. Yes.

Q. I just want to clear up one point, do I understand you to say that none of the factories pay any part of the salaries of those two employees?

A. No sir.

Q. They do not pay them?

A. No sir, none of it.

Mr. Naylor: That is all.

Cross Examination

Mr. Schapp:

Q. Mr. Mitchell, if Scovel & Son or any other jobber, that you know, comes to your office or store, and asks for a half dozen Detroit signals, you will give him those half dozen Detroit signals out of that stock?

A. If he has a written order from the jobber.

Q. If the jobber comes himself, it would be the same thing?

(Testimony of Thomas A. Mitchell.)

A. If he sends a pickup man, yes. [126]

Q. That stock you have on hand is not yours but it is the stock of the Detroit Company?

A. It is the warehouse stock of the Detroit Products Company.

Mr. Schapp: That is all.

Mr. Naylor: That is all.

Mr. Miller: I will offer in evidence a certified copy of the file wrapper contents of the patent in suit, number 2153634.

(The file wrapper was Marked Defendant's Exhibit S in evidence)

Mr. Miller: I will also offer in evidence a certified copy of the file wrapper contents of the design patent, number 109148.

(The file wrapper was marked defendant's Exhibit T in evidence.)

Mr. Miller: Would your honor prefer to have the prior patents, that were cited, included as a single exhibit or as separate exhibits, there are quite a number of patents?

The Court: I don't see any reason why they could not be introduced as a single exhibit and when you refer to them, you can refer to them by naming the number of the patent.

Mr. Miller: I will also offer in evidence, an uncertified copy of the prior patents, both United States and foreign, that were cited by the Examiner

in the two applications, as our next exhibit. I should inform the Court that of these, we have designated to the opposing counsel that the patents that we specifically rely on are the patents to Elliott, #1,415,817; Kimbrough, #1,600,887; Stimson, 1,807,350; Costenbader, #1,673,865; Reynolds, #1,873,033; Carter, #1,659,082; Miller, 1,860,719; and the British Patent to Dennis, #341,652. They have been segregated, temporarily from the rest and the others are offered, merely for the sake of completeness of the file wrapper.

(The documents were marked Defendant's Exhibit U in evidence.)

Mr. Miller: I will offer in evidence, defendant's interrogatory [127] Number 31 reading: "Does the plaintiff have any written license under any of the patents bearing the patent numbers listed in interrogatory number 29, The answer to this being: "No specific written license except as implied in correspondence and transactions."

Mr. Miller: Also Interrogatory 32 reading: "Has the plaintiff been in any way requested or required to apply the patent numbers listed in interrogatory 29 to the signal arms manufactured and sold by plaintiff or Industrial Scientific Company? The Answer being: "No specific request but consent implied in transactions."

Mr. Miller: Also Interrogatory 33 reading: "Are the patents having the numbers listed in interrogatory 29 owned by the person or concern that

supplies to plaintiff or Industrial Scientific Company the lenses that are used in the plaintiff's arms? The answer being: "Yes, as far as plaintiff is informed."

Mr. Miller: Interrogatory 34, reading: "Do any of the patents bearing the numbers listed in interrogatory 29 pertain to the construction of a signal arm as distinguished from the lenses that the plaintiff may manufacture in his arms and their method of manufacture?" The answer being: "No, as far as plaintiff is informed."

Mr. Miller: Interrogatory 35, reading: "What is the normal distance between the point where the patent numbers listed in interrogatory 29 are applied to the plaintiff's arms and the nearest lens on the plaintiff's signal arm?" The answer being: "Approximately five inches."

Mr. Miller: I notice that all these interrogatories refer to the patent numbers in Interrogatory 29, so I will offer that interrogatory also. It reads: "Has the plaintiff or Industrial Scientific Company sold arms bearing any of the following patent numbers? 1,591,572; 1,671,086; 1,743,834; 1,807,350; 1,848,675; [128] 1,895,173; 1,906,655? The answer is: "Yes."

Mr. Miller: There may be one or two other interrogatories, I would like to have an opportunity to check on them during the noon recess. I will next offer in evidence the depositions filed, that were taken of the witnesses, L. E. Smith and H. E. Smith.

That may be offered as a deposition and deemed read?

The Court: Yes.

L. E. SMITH,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Miller: State your full name, please, Mr. Smith. A. Larnie E. Smith.

Q. Where do you live, Mr. Smith?

A. 2156 Hatchway, Compton.

Q. What is your occupation?

A. I am not doing anything right at the present time. I was a truck man, is what I am, a truck operator.

Q. Were you a truck driver?

A. No; an operator. I owned the trucks.

Q. You were engaged in the trucking business with a fleet of trucks, were you?

A. Yes, sir.

Q. What is your age? A. 44.

Q. Are you acquainted with Mr. Wallace, who is sitting here in this room? A. Yes, sir.

Q. About how long have you known him?

A. As near as I can figure, I have known him ever since 1930. [175]

Q. Did you ever visit his place of business?

(Deposition of L. E. Smith.)

A. I have been over there twice in the last ten years.

Q. Do you recall approximately when it was that you first went to his place of business?

A. It was right after the earthquake in 1933, the first time I was over to his place of business.

Q. What earthquake do you have reference to?

A. The one we had here in California.

Q. Down at Long Beach?

A. Yes. I think that was March 2 or 5 or some place right in there.

Q. Did I get the year straight? Was that 1923 or 1933? A. 1933.

Q. Did you observe anything that was being manufactured in Mr. Wallace's plant during your visit there in 1933? A. I did.

Q. What did you observe?

A. I watched him work on some signals and I watched him work on some boosters.

Q. Will you describe these signals which you saw him working on?

A. Well, they were nothing only—or the quickest way to explain is I watched him mold these things here in [176] these here signals like this.

Mr. Miller: I will ask that this signal be marked as Defendant's Exhibit D.

Q. Referring to Defendant's Exhibit D, you say that you saw him forming these side plates that are shaped like an arrow? A. Yes, sir.

Q. And what part of the forming operation did

(Deposition of L. E. Smith.)

you see?

A. They were molding this here raising here or this raise, is what they were doing.

Q. That runs down the center?

A. Yes, sir.

Q. About how many of those plates did you observe them working on?

A. That is guesswork. There was a big stack of them. I couldn't tell you how many were in that stack.

Q. Did you see any of the signals made up completely? A. Not that day.

Q. Who was with you at the time that you went to their place of business?

A. My father.

Q. Was anybody else present besides your father and Mr. Wallace and you?

A. Mr. Wallace wasn't there but his brother was there. We call him "Bud". I don't know what his name [177] is because I have never seen him but once or twice in my life.

Q. Did you ever purchase any signals from Mr. Wallace? A. Yes, sir; lots of them.

Q. Approximately when was it with relation to this first visit?

A. That was about two or three weeks afterwards I purchased the first two signals.

Q. How did the signals that you purchased from Mr. Wallace compare with Exhibit D?

A. Well, as near as I can remember, there were

(Deposition of L. E. Smith.)

two things on this one, I think, the same as that one, that is, made exactly the same. It had these little buttons on and it had this diamond shape in here instead of this oval shape. They had these diamonds in here on both sides.

Q. Was the shape of the two side plates the same?

A. As near as I can remember, exactly the same.

Q. Was it painted a light color like that?

A. They weren't when they were making them but they were when I got them; yes. And they were riveted together just like that.

Q. Riveted along the edges here?

A. Yes, sir. It was two pieces riveted together.

Q. And was the end reflector or button larger than the buttons along the length of the arm? [178]

A. Yes, sir.

Q. On both sides? A. Yes, sir.

Q. Were the end reflectors approximately the same size as these end reflectors that are on this exhibit? A. Yes, sir.

Q. How about the smaller reflectors? Were they about the same size?

A. The same size exactly, only except as I told you it was different.

Q. Did the arms that you purchased have an angular end on them like this angular end here?

A. Yes, sir.

Q. What did you do with the signals that you purchased from Mr. Wallace?

(Deposition of L. E. Smith.)

A. I put them on my trucks.

Q. Do you still have any of your trucks?

A. No, sir.

Q. What became of the trucks?

A. I sold them all two years ago.

Q. Did you sell them with the arms on them?

A. Yes, sir. I wouldn't swear it was these same arms then because I bought a later style and put on them but I bought all of my arms ever since 1933 from Mr. Wallace.

Q. I hand you what purports to be an invoice of the [179] Detroit Products Company. Do you know anything about that? A. Yes, sir; I do.

Q. What is that?

A. That is an invoice I got on May 10, 1933 for a bunch of clearance lights and reflectors, fuses and arm signals.

Q. Is that the invoice for the first two signal arms like Exhibit D that you purchased from Mr. Wallace? A. It is.

Q. Prior to the time that you gave this invoice to me last week, had that invoice been in your possession continuously since the time that Mr. Wallace delivered it to you? A. Yes, sir.

Q. Is that invoice in the same original condition that you received it from Mr. Wallace, aside from the application of this red ink number on it?

A. Yes, sir.

Q. That red ink number there is what?

A. It is my file number.

(Deposition of L. E. Smith.)

Q. You took delivery of the signal arms similar to Exhibit D when with relation to the date of that invoice? A. The same day.

Q. Did you purchase any later arms from Mr. Wallace? A. Yes, sir.

Mr. Miller: I will now offer in evidence Defendant's [180] Exhibit D, and I will offer in evidence the invoice of May 10, 1933 as Defendant's Exhibit E.

Q. I will hand you another invoice, dated January 26, 1934, and ask you if you know anything about that invoice. A. This is okay.

Q. Did you receive that from Mr. Wallace?

A. Yes, sir; we did.

Q. I notice on the invoice a reference to an arm. Do you know what that has reference to?

A. Arm signals.

Q. Of this character like Defendant's Exhibit D? A. Yes, sir.

Q. Did you receive a signal arm like Defendant's Exhibit D on or about January 26, 1934?

A. Yes, sir.

Q. Did you use that on your trucks?

A. Well, I had that on all of the trucks. I undoubtedly did. Of course, we sold lots of them also.

Q. Approximately how many altogether of the arms of this character did you buy from Mr. Wallace? A. I don't have any idea.

Q. Would you say as many as a hundred?

(Deposition of L. E. Smith.)

A. Well, I wouldn't say it was exactly that many. It might be, though, now. Between me and my brother we sold oodles of them. [181]

Q. Would you say it was more than twenty-five?

A. Yes.

Mr. Miller: I will offer the invoice of January 26, 1934 in evidence as Defendant's Exhibit F.

Q. I show you a check, which appears to be dated June 13, 1933. Do you know anything about this check? A. Yes, sir.

Q. Is that your check that you drew?

A. Yes, sir.

Mr. Schapp: Is that an "L" there or an "F", the first initial there?

Mr. Miller: You can ask him on cross examination.

Q. This check was made payable to Mr. Wallace?

A. Yes.

Q. In payment for signals that you purchased?

A. Well, that was signals. It was this invoice here for a bunch of more stuff, boosters and stuff.

Q. That is, this invoice of May 10, 1933?

A. Yes.

Q. I notice that invoice totals up \$21.22, whereas, your check is payable in the amount of \$36.10.

A. Yes. But wait a minute. I took some more stuff out of his car that he had with him and put on the trucks while he was there and it made it that amount.

Mr. Miller: I will offer the check in evidence as

(Deposition of L. E. Smith.)

Defendant's Exhibit G. You may cross-examine.

[182]

Cross Examination

Q. By Mr. Schapp: Mr. Smith, in your direct examination I understood you to say that there were two points of difference between this arm and the arm you originally purchased and you brought out only one of the points, which was that the little buttons were somewhat different shaped from this. What was the second point you had in mind?

A. These holes were different than these here, different sizes.

Q. How much did you pay for those signals?

A. I couldn't tell you. The invoice there shows you.

Q. I call your attention to the fact that on one of these exhibits the price is \$1.75 per unit and on Exhibit F it seems to be 75 cents. Doesn't that seem to indicate those were different items?

A. No. Those were the same items. The price didn't spell so much because when he came along and had one he let me have it. So far as the price is concerned I don't know. I bought everything as cheap as I could.

Q. Do you mean to say there was no standard price for the articles?

A. The standard price was \$1.75 when he first started but later on we got some a whole lot cheaper.

Q. When did you first see this arm here?

(Deposition of L. E. Smith.)

A. This one here, this original one here? [183]

Q. Yes.

A. Last Tuesday. Wasn't it last Tuesday we were up here, Mr. Miller?

Q. Do you know where the arms are that you originally bought?

A. No; I couldn't answer that because they were on the trucks. So I couldn't tell you where they are at. I have no idea.

Q. Do you mean to say that there are some hundred arms that you bought and you couldn't locate any one of them?

A. I don't know how you could locate them. Some of the trucks are in wrecking yards and some of them are in the northern part of the State and everywhere else. I don't know where they are at.

Q. I don't seem to be able to read the date on this check. Can you tell me what the date of that check is?

A. That check was written May 3, 1933.

Q. By Mr. Miller: May?

A. Yes, sir; or June, it is. The cancellation date is on here and you can look at that. And that is the 13th instead of the 3rd. There is a "1" in front of that "3". It was cashed on the 15th according to the cancellation.

Q. By Mr. Schapp: The actual year doesn't seem to appear on either the cancellation or the check.

A. It says "1933" on there in ink. [184]

Mr. Schapp: All right. That is all.

(Deposition of L. E. Smith.)

Redirect Examination

Q. By Mr. Miller: Just one question, Mr. Smith. Did I understand you to say that the small buttons on Exhibit D were of a different shape or were they round like this?

A. No. You don't get me. They were exactly the same size as these but, when the light hit them, they had a diamond effect like this here. I never saw these diamonds until last Tuesday.

Q. In other words, the reflecting surfaces that you see in here of the small buttons were similar to the reflecting surfaces in the large button?

A. Yes, sir; that is it.

Q. But the shape and size of the entire reflector were the same? A. Yes.

Mr. Miller: That is all.

Mr. Schapp: That is all.

Mr. Miller: Will you waive the reading and the signing, Mr. Schapp?

Mr. Schapp: Yes.

The Notary: And does the witness waive the examination and signing of the deposition?

The Witness: Yes. [185]

H. E. SMITH,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Q. By Mr. Miller: What is your full name, Mr.

(Deposition of H. E. Smith.)

Smith? A. Henry Edwin Smith.

Q. And where do you live?

A. In Compton.

Q. What is your present occupation?

A. Just kind of a lackey boy, is all I can tell you. I haven't got much of an occupation. I help the boy around the garage, just running errands and things like that.

Q. What is your age, Mr. Smith?

A. 64 years.

Q. Are you related to the L. E. Smith who was just in here testifying? A. Yes, sir.

Q. What is the relationship?

A. I am his father.

Q. In 1933, did you have any occasion to be around his place of business?

A. Around L. E. Smith's, do you mean?

Q. Yes.

A. Oh, yes; I was there every day as far as that is [186] concerned.

Q. Did you ever visit the place of business of the Detroit Products Company or that of Mr. Wallace, who is sitting here in this room?

A. Yes, sir.

Q. About when was it you first visited his place of business?

A. Well, as well as I remember, it was about 1933. That is the time, I think. It was right after the earthquake. I couldn't give you the date of the month or the date of the week but we had a little

(Deposition of H. E. Smith.)

business over there. We were trying to buy a truck cab from him. He had a house trailer, that is, he was building one. I mean Mr. Wallace was building one on a truck and we tried to buy it. Or he was having it done. He wasn't doing the building.

Q. Did you observe any arm signals being made at Mr. Wallace's place of business on this visit?

A. I did; yes, sir.

Q. Will you describe what you saw in this connection?

A. Well, sir, they had a pile of them laying there and I looked them over. They looked just like that except they didn't have these buttons on and they were not painted and the arm wasn't there but, outside of that, they were identically the same thing as far as my knowledge is concerned from looking at them at that time.

Mr. Miller: Let the record show that the witness [187] referred to Defendant's Exhibit D.

Q. You say in connection with this arm Exhibit D that it didn't have these reflector buttons on?

A. No. It was in the making. It wasn't painted or anything but the form was all made up to here. They had a pile of them laying there.

Q. You refer, then, just to these sheet metal parts? A. Yes.

Q. Was the angular end on the arm?

A. No; it wasn't on the ones I was looking at.

Q. Did those that you were looking at have this raised center portion running down the center of

(Deposition of H. E. Smith.)

the arm like you see it here?

Mr. Schapp: I object to that as leading.

A. Yes; exactly like that.

Q. By Mr. Miller: Did they have any rivet holes in them?

A. Well, now, I just picked them up and looked over them. They were not fully made. They were in blank form. I couldn't swear whether they had rivet holes in them or not.

Q. At any later date did you ever see any completed arms made up from the type of plates that you saw down there? A. Yes.

Q. About how much time elapsed between your visit [188] and the time that you saw the completed arms?

A. Well, to the best of my knowledge, it couldn't have been over two or three weeks because my son had bought some. He was trucking and he had them laying on his desk and I was looking at them over home after he had got them to his place of business.

Q. That is, your son had obtained some?

A. He had obtained some of these for his trucks. He was trucking at that time and he got some of those from Mr. Wallace.

Q. Did you ever see any of these arms similar to Exhibit D on any of your son's trucks?

A. Yes, sir.

Q. How did those completed arms that you saw on your son's trucks compare with this Exhibit D?

A. Well, the same but these little reflectors seem

(Deposition of H. E. Smith.)

to be different. There is a little different glass in here than there was at that time but the big one looks about the same. To the best of my knowledge, the big ones were the same and the little ones were a little different glass of some kind. Just the reflectors were changed there, is all.

Q. Were the littles ones circular?

A. They were round just like this. As far as my knowledge is concerned, I don't know the kind of glass that was in there but they don't seem like that.

Q. Were they about the same size? [189]

A. Yes.

Q. How about the big ones?

A. They were the same thing.

Q. Was the completed arm that you saw on the truck painted white?

A. It was painted white.

Q. Did the completed arm that you saw on the truck have these angular ends on them?

A. Yes, sir.

Q. Were the two holes in it like that?

A. Yes, sir.

Q. When did you see those arms on the truck with relation to the time that you first saw those on your son's desk?

A. Oh, it was right after he had got them. He put them right on his rig. I don't know the date, though. I couldn't tell you that. That would be absurd.

(Deposition of H. E. Smith.)

Q. Do you know whether your son used those arms on his trucks throughout the latter part of 1933?

A. He did; yes, sir. He used them on them.

Q. Do you have any idea how many trucks were equipped with these arms by your son?

A. No; I don't. He didn't have but three or four trucks and I don't know whether he had them on all of them or not. I remember him having them on a big White truck he had and another one that he had there. He had two of [190] them as well as I remember. Two arms is what he bought at the time he first got them. I never asked him, though, how many he got. I never butted in or asked any question about it whatever.

Q. Were those arms that were on the trucks riveted along the edges like the rivets on this exhibit?

A. Yes; they were similar to this here rivet here. I suppose that is what held the arm on but I don't know.

Mr. Miller: You may cross-examine.

Mr. Schapp: No cross examination.

Mr. Miller: Do you waive the reading and signing by the witness, Mr. Schapp?

Mr. Schapp: Yes.

The Notary: Does the witness waive the reading, examination and signing of the deposition?

The Witness: Yes. [191]

Mr. Miller: It is hereby stipulated that, if Frank

(Deposition of H. E. Smith.)

Fred Hartman, named in the notice as Fred Hartman, were called as a witness, he would testify that his correct name was Frank Hartman; that he lives at 225 West 115th Street, Los Angeles; that he has known Mr. Wallace since 1930 and that he is a plumber; that about the middle of May, 1933, he called at Mr. Wallace's place of business for the purpose of going bowling with Mr. Wallace; that Mr. Wallace was then busily engaged in filling an order for signals of the same type as Defendant's Exhibit D and that Mr. Hartman assisted Mr. Wallace is assembling these signals together so that he could get away to go bowling; that he would set the date with reference to his having rented a new place on May 1, 1933 and having borrowed a truck from Mr. Wallace to help him move, and that this event, when Hartman assisted in assembling the signals, took place on the evening of the day that he brought the truck back and this was about the middle of May, 1933. In fact, Hartman would set the date as being on a Sunday evening in the middle of May, 1933.

Mr. Schapp: I so stipulate.

Mr. Miller: That is all.

[Endorsed]: Filed Aug. 2, 1940. [192]

Mr. Miller: I will also offer in evidence the defendant's arm, the defendant's Exhibit D referred to as such in these depositions.

The Court: It is already in, isn't it?

Mr. Miller: It is only in evidence, as a part of the deposition. We are calling attention to it in connection with the deposition.

The Court: What deposition, Smith?

Mr. Miller: Yes, there were two Mr. Smiths, and both of them refer to this exhibit.

The Court: Yes.

(The arm was marked Defendant's Exhibit D in evidence.)

Q. Mr. Miller: I will offer Defendant's Exhibit E, referred to in the depositions of Smith, this being an invoice of the Detroit Products Company bearing date of May 10, 1933.

The Court: What is that attached to?

Mr. Miller: That is attached to the deposition of the two Mr. Smiths.

The Court: In connection with the two depositions?

Mr. Miller: Yes sir.

The Court: How is it marked there?

Mr. Miller: Defendant's Exhibit E.

(The invoice was marked Defendant's Exhibit E in evidence.)

Mr. Miller: I also offer in evidence, as Defendant's Exhibit F, the Exhibit F in connection with the depositions. That is an invoice of the Detroit Products Company, dated January 26, 1934.

(The invoice was marked Defendant's Exhibit F in evidence.) [129]

Mr. Miller: I also offer in evidence the Defend-

ant's Exhibit G in connection with the Smith depositions, this being a cancelled check, dated June 13, 1933, payable to Mr. Wallace, and signed F. E. Smith.

(The check was marked Defendant's Exhibit G in evidence.)

The Court: We will take a recess until two o'clock.

(Thereafter a recess was taken until two o'clock p. m. this day.)

Afternoon Session

Mr. Miller: I will offer in evidence the deposition of Cecil L. Armstrong and ask that the same be considered deemed read.

The Court: Yes.

CECIL L. ARMSTRONG,

a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Miller: What is your full name, Mr. Armstrong? A. Cecil Lincoln Armstrong.

Q. And where do you live?

A. Oxnard, California.

Q. And what is your occupation?

A. Truck owner.

Q. Are you engaged in the trucking business?

A. Yes, sir.

Q. What is your age? A. 45.

(Deposition of Cecil Armstrong.)

Q. Are you acquainted with Mr. Wallace, who is sitting here in this room? A. Yes, sir.

Q. About how long have you known him?

A. Well, I have known him practically—let's see—about 20—no; about 16 years.

Q. Did you ever buy any signal arms for use on your trucks from Mr. Wallace? A. Yes, sir.

Q. I will show you a signal arm and, disregarding [202] the rusted appearance of this particular signal arm, I will ask you to state whether or not you ever bought any signal arms that appeared similar to that? A. Yes, sir.

Q. Were they exactly the same as that construction, disregarding the rusted appearance of it?

A. Yes, sir.

Q. Approximately when was it that you bought such a signal arm from Mr. Wallace?

A. In 1932.

Q. In 1932? A. Yes, sir.

Q. Do you have any written record pertaining to the purchase of a signal arm from Mr. Wallace in 1932?

A. Yes. I have a check and a stub there.

Q. I will hand you a check numbered 11,086 and ask you what that is.

A. It was payments for a signal arm and a signal, as is written in the check there or the stub; for lights and a signal.

Q. And is that check written in your own handwriting? A. Yes, sir.

(Deposition of Cecil Armstrong.)

Q. That was delivered to Mr. Wallace approximately when? A. On April 6th.

Q. 1932? [203] A. 1932.

Q. I will hand you a book of stubs and ask you what this is.

A. This is a stub that connects up with that check. It is No. 11,086.

Mr. Schapp: May I look at that?

A. Yes.

Q. By Mr. Miller: This book is a book of check stubs of all checks that you were issuing at or about that time? A. Yes, sir.

Q. Is this stub of check No. 11,086 written in your own handwriting? A. Yes, sir.

Q. I notice that written on the stub is "for Lites, Signal". A. Yes, sir.

Q. That had reference to this signal of the type that you now have and what else?

A. And light bulbs.

Q. Light bulbs? A. Yes.

Q. Are all of the stubs in that book of stubs written in your own handwriting?

A. No. My wife did some of them. This is her handwriting here.

Q. The handwriting on the stub of check No. 11,087 [204] is your wife's?

A. That is my wife's.

Mr. Miller: I will offer in evidence the signal as Defendant's Exhibit I. I will offer in evidence the check as Defendant's Exhibit J and I will offer

(Deposition of Cecil Armstrong.)

in evidence the book of stubs, and particularly the stub for check No. 11,086, as Defendant's Exhibit K.

Q. Did you ever purchase any other types of signals from Mr. Wallace besides this signal that you now have, Defendant's Exhibit I?

A. Yes. I think, in 1926 or 1927, I bought an arm signal with a hand like that.

Q. Similar in shape to your own hand?

A. Yes. It had an arm on it up here where the control hooked onto it, to set it at different angles.

Q. After you bought a signal in 1932 similar to Defendant's Exhibit I, did you buy any further arm signals from Mr. Wallace?

A. Yes, to require with the law.

Q. Will you describe the type of signal that you bought from Mr. Wallace after having purchased Defendant's Exhibit I or a signal like it?

A. Well, it was a signal made something similar to this, with an arm on it and it had a raised center and one big red button, I believe, and three small buttons.

Q. On one side or on both sides? [205]

A. On both sides.

Q. I will show you Defendant's Exhibit D. How did those signals that you are now speaking of compare with that exhibit? A. That is like it.

Q. Did the signals that your purchased from Mr. Wallace have the raised center portion?

A. Yes.

Q. Running along the center of each side like that exhibit? A. Yes, sir.

(Deposition of Cecil Armstrong.)

Q. Were the reflector buttons about the same shape and size? A. Yes.

Q. Approximately when was it that you bought signal arms from Mr. Wallace of that character?

A. In 1935, I believe, was the time we bought that.

Q. Did you use signal arms of the character of Exhibit D on any of your trucks? A. Yes.

Q. Did you use a signal of the type exemplified by Defendant's Exhibit I on any of your trucks?

A. This?

Q. Yes. A. Yes; we used this.

Q. Do you know where the signal arm that you purchased [206] from Mr. Wallace in 1932, similar to Defendant's Exhibit I, now is?

A. No; I couldn't say.

Q. Do you still have the truck it was put on?

A. No.

Q. Do you know where the truck is?

A. No; I wouldn't know.

Q. Did the arm of the character of Defendant's Exhibit I, which is that one there, remain on your truck until you sold it? A. I believe it did.

Q. Approximately when was it that you sold the truck?

A. I made a change in trucks in 1934 and I believe that this truck went in that bunch that I traded off.

Mr. Miller: You may cross examine.

(Deposition of Cecil Armstrong.)

Cross Examination

Q. By Mr. Schapp: Mr. Armstrong, referring to this arm, Defendant's Exhibit I, this specimen which I hold in my hand here, you never really used that, did you?

A. No; not that particular one; I didn't.

Q. When you testify with respect to this personally, you merely testify from memory?

A. Yes; from memory.

Q. When did you first see this arm?

A. The other day in the attorney's office here.

[207]

Q. In Mr. Miller's office here? A. Yes, sir.

Q. When was the question of this suit first brought to your attention?

A. I just don't remember now when it was. Let's see. Approximately two weeks ago, I would say.

Q. Approximately two weeks ago?

A. Yes.

Q. Who brought it to your attention?

A. Mr. Wallace.

Q. Where was that? A. At my home.

Q. Will you please relate just what happened at that time?

A. He told me that he had a suit come up against him for infringing on a patent right, and he asked me if I had ever bought any signal arms off of him

(Deposition of Cecil Armstrong.)

in 1932 and I said yes. Then he asked me if I would come down here with him to the attorney's office and I said yes; I would be glad to.

Q. When did you first see this arm, this particular specimen, I mean, Defendant's Exhibit D?

A. In the attorney's office here.

Q. And, if you testified that you bought similar arms in 1935, that is from memory only?

A. Yes, sir.

Q. Your comparison between the arm you supposedly [208] bought in 1935 and this arm is merely from memory?

A. Yes, sir.

Q. Do you know when this arm was made, Defendant's Exhibit D?

A. No; I don't.

Q. Do you know who made it?

A. The Detroit Products made it.

Q. I beg your pardon?

A. The Detroit Products.

Q. Isn't it customary for a company to put their name on an arm manufactured by it for the market?

Mr. Miller: That is objected to as incompetent, irrelevant and immaterial and not proper cross examination.

A. I don't know as to that.

Mr. Schapp: That is all. [209]

Mr. Miller: Defendant's Exhibit J referred to in that deposition which is a check signed by Mr. Armstrong payable to Mr. Wallace dated April 7,

1932, and also Defendant's Exhibit K and book of check stubs of this book of check stubs the stub for check Number 11086 is specifically introduced.

(The check and the book of check stubs were marked Defendant's Exhibits J and K, respectively.)

Mr. Miller: I will offer Defendant's Exhibit I referred to in the deposition.

(The arm was marked Defendant's Exhibit I in evidence.)

FLOYD E. WALLACE,

called as a witness for defendant, being duly sworn,
testified as follows:

Direct Examination

Mr. Miller: State your name to the Court, please? A. Floyd E. Wallace.

Q. Mr. Wallace, you are one of the defendants named in this action? A. Yes, sir.

Q. Where do you live?

A. At 218 Loma Vista St., Sl Segundo, California. [130]

Q. Who is Mr. Percy J. Elwell?

A. He is a co-partner of mine, as owner of the Detroit Products Company.

Q. He lives where?

A. There are two parts to the house, two units I believe it gives the same number, 218 Loma Vista St., I don't think it's 218½.

(Testimony of Floyd E. Wallace.)

Q. El Segundo? A. That's right.

Q. How long have you been engaged in manufacturing arm signals for trucks?

A. I started in 1927.

Q. At El Segundo?

A. At Wilmar. I moved to El Segundo in 1930, we moved our business to El Segundo.

Q. Both Wilmar and El Segundo are in Los Angeles County? A. That's right.

Q. Will you describe briefly the first type of signal arm you were manufacturing in 1927?

A. It had the shape of my hand drawn onto a piece of tin and cut therefrom and clamped and hinged and attached to a truck. It was long enough to reach out beyond the widest portion of the body. That was required by law, that it should be of that type of signal that would reach beyond the cab. It so stated in Section 130 of the Motor Vehicle Code adopted in 1925.

Q. That is the Motor Vehicle Code of the State of California? A. Yes.

Q. I will show you a duplicate of Defendant's Exhibit A, that is attached to the interrogatory answers and ask you whether on the illustration of that exhibit, it shows the type of signal arm you were manufacturing and selling in 1927?

A. It does other than it is a pencil drawing and not as good looking as the product itself. That is a circular we passed out to the trade.

Q. In 1927? A. In 1927, yes sir.

(Testimony of Floyd E. Wallace.)

Q. It was intended to illustrate the arm you were selling at [131] that time?

A. It is installed on the vehicle it would be used on.

Mr. Miller: I will offer this circular in evidence as Defendant's Exhibit A.

(The circular, attached to Defendant's Answers to Interrogatories, filed March 23, 1940, was marked Defendant's Exhibit A in evidence.)

Q. Did you make any later form of arm for trucks that was a change from that arm that was shown in Defendant's Exhibit A?

A. Yes sir in 1931.

Q. Will you describe briefly, what kind of an arm that was?

A. It had a long shaft, I say a long shaft, about sixteen inches long, on the point of that was a round circle. It had a large reflector button, I say large, about an inch and a half or an inch and three-quarters on the very end of the shaft. It had three small reflector buttons on the arm or straight portion of the shaft. Those buttons were on both sides, by the way.

Q. I show you a blue print, do you know anything about this blue print, can you identify it?

A. Yes sir, that originated at our place of business, that is not the—this is a reproduction from old parts of signals we had there.

Q. Does this top arm, that is shown in this blue print, illustrate the type of arm you have just described?

(Testimony of Floyd E. Wallace.)

A. Yes sir, only that, there isn't enough difference in the drawing of the size of the reflector on the very end of the arm in comparison with the three on the shaft, that is the difference, this reflector on the circle end should be just twice the size of this because these are three-quarter or one and one-half inch. I don't just recall the size of them.

Q. The outer reflector was about an inch and a half and the three inner reflectors were about an inch?

A. About three quarters of an inch. [132]

Q. Three quarters of an inch? A. Yes.

Q. You manufactured and sold that type of arm when?

A. In 1931. There was only about fifteen or sixteen of those made, of that particular type. The reason we didn't make it, we cut it out with tin snips and it was too hard to make the circle.

Q. Was the body of the arm made out of one piece of sheet metal?

A. Two pieces of sheet metal.

Q. Riveted together at the top——?

A. Of a long shaft.

Q. Did it have a raised center portion or not?

A. It had a raised center portion. It had to have a raised center portion to take care of a small stud that was on the reflector buttons, license plate fasteners, I believe they call them, it is a small nut to clamp it in behind, and in that raised portion it was necessary to have a recess space to hold those units

(Testimony of Floyd E. Wallace.)

on the arm. The raised portion also gave strength to the signal.

Q. Now, referring to the lower of the two figures that are on this blue print, does that illustrate any type of arm you made?

A. Yes, this lower signal is made up of parts—this part down here was parts of stamps that was used on, I believe, the wigwag signal. I took them and fastened them to a piece of flat metal, making a sort of working model, to get prices from die manufacturers as to what it would cost to make dies. The prices they gave me and the amount of signals we were selling, didn't warrant spending that much money, because it didn't—we kept on with the type we were making prior to this. We only made two working models and submitted them, for prices, to the die shop. Not being a good draftsman, it was easier to make the working model than to pay the cost of the die man. He had the presses and could readily give us the prices of those dies.

Q. Did you ever sell that type of arm as shown in the lower two [133] figures?

A. Yes sir, I did.

Q. To whom?

A. To Armstrong Trucking Company at Oxnard, California.

Q. Do you recall approximately when?

A. It was in the early part of 1932.

Q. I will offer the blue print in evidence as Defendant's Exhibit C.

(Testimony of Floyd E. Wallace.)

Mr. Schapp: I will object to it, your Honor, as not being properly identified. It may have been made yesterday, for all it shows.

The Court: When was it made?

The Witness: It wasn't made yesterday, it is three or four months old. It is made up¹ from a signal we did have in our possession, and is the same type that was sold. I made two of them as I stated. So far I have been unable to find the second one, we used it on our own truck.

The Court: Was this figure on the blue print made from memory?

The Witness: The figures on the blue print would be identification marks of drawings——

The Court: You say you had these blue prints made about three months ago?

The Witness: Those ones there are not more than three or four months——

The Court: Where is the original?

The Witness: I am not able to tell you that.

The Court: Who drew those figures on that blue print?

The Witness: The man that drew it.

The Court: Who?

The Witness: I believe Mr. Elwell made that.

The Court: When?

The Witness: When that blue print was made?

The Court: When? [134]

The Witness: Three or four months ago, five months ago, before——

(Testimony of Floyd E. Wallace.)

Mr. Miller: Let me clear it up. The drawing was prepared in response to interrogatories. I am merely introducing it as being illustrative of what the witness is testifying to.

The Court: It may be admitted for that purpose.

(The blue print was marked in Evidence as Defendant's Exhibit C.)

Q. I hand you Defendant's Exhibit I, do you recognize this arm? A. Yes sir.

Q. What is it?

A. That is the signal, that was our working model, that was made to submit to the die makers to get prices for dies.

The Court: You have already testified about it. You have already mentioned it in your testimony haven't you?

The Witness: Yes sir.

Q. Is that the arm that was sold to Mr. Armstrong?

A. That is the same type of arm that was sold to Mr. Armstrong.

Q. Did you make any further type of arm for use on trucks beside these you have already mentioned? A. Yes sir.

Q. Will you describe those?

A. The next signal that we made was in the form of an arrow carrying raised portions in the middle for stiffening purposes. It had an arrow shape on the end and using the same hinging arrangement all of our signals have—carrying the same hinging arrangement.

(Testimony of Floyd E. Wallace.)

Q. I show you Defendant's Exhibit D, do you recognize that arm? A. Yes sir.

Q. What is it? Is that the one you made up?

A. Yes sir.

Q. Did you sell that kind of arm?

A. Yes sir.

Q. Very many of them?

A. I would say, maybe, of this particular type, the very thing I have in my hand, I would say three or four thousand of them.

Q. What were those arms used on generally?

A. This particular size [135] arm was used on school buses.

The Court: On what?

The Witness: School buses.

Q. Do you recall any bus companies or school bus companies that purchased those arms and used them on their buses?

A. This type of arm I sold to Gillig. I believe he had a bus manufacturing place on Van Ness Avenue here in San Francisco, at that time.

The Court: When was that?

A. This arm was sold in 1931, 1932 and on up to 1935.

The Court: That is Defendant's Exhibit D?

Mr. Miller: Defendant's Exhibit D.

Q. Will you explain to the Court how those reflectors are fastened to that arm?

A. The reflectors are fastened to the arm, and attached to this reflector, is a small stud that is

(Testimony of Floyd E. Wallace.)

threaded. There is a nut on the back of it, about, Oh, I would say, three-sixteenths of an inch thick, and all of them are the same. They all are fastened firm to the annexed portion inside. The nuts are concealed.

Q. There is a hole in the raised center portion that the stud goes through? A. Yes sir.

Q. And a nut on each stud? A. Yes.

Q. In the space of the center portion of the two plates, you have the end of the studs coming toward each other, and a nut on each? A. Yes.

Q. Do you know Mr. Smith?

A. Yes, I know him.

Q. Did you ever sell any arms to Mr. Smith?

A. Yes sir.

Q. Approximately when?

A. I have sold Mr. Smith arms of that design in 1933.

Q. I will show you Defendant's Exhibit E, the invoice dated May 10, 1933, do you recognize that invoice? A. Yes sir.

Q. What is that invoice?

A. That is an invoice governing a bill [136] of merchandise I sold to Mr. Smith.

Q. Is that written in your own handwriting?

A. My signature is on there, "Paid. Wallace", the pricing of the invoice looks to be mine.

Q. Do you know whether or not that invoice had reference to an arm of the character of Defendant's Exhibit D?

(Testimony of Floyd E. Wallace.)

A. Yes sir, it has reference to that arm signal.

Q. Did you deliver the arm like Defendant's Exhibit D, to Mr. Smith at the time of the invoice, May 10, 1933?

A. Yes sir.

Q. Now, did you make any other style of arm besides this character Defendant's Exhibit D, and those that you have previously described?

A. Yes, we made one almost the shape of that, only that we put six reflectors on each side of the signal instead of four, as is on that one, on that signal. We used Libby Western catafote buttons.

Q. I will show you what appears to be a circular, do you recognize that circular?

A. Yes sir.

Q. What is it?

A. That is a circular distributed to the trade, illustrating the signal using the Western catafote buttons.

Q. You had those printed up for your use and distribution to the trade?

A. Yes sir.

Q. Approximately when?

A. The latter part of July or the early part or the middle part of August of 1935.

Q. Did that signal as illustrated in that circular did that have a raised center portion of the plate?

A. Yes sir.

Q. And have the marginal flanges?

A. Yes sir.

Q. And they were riveted together?

A. Yes sir.

(Testimony of Floyd E. Wallace.)

Q. How are the Western catafote buttons marked on that?

A. They are riveted to each body portion of the arm down the center.

Q. And the inside rivet heads are located where?

A. In that raised center portion on the three main—Three of the reflectors on the shaft. [137]

Q. Did you make up and sell those signals in 1935, as illustrated in this circular?

A. Yes sir.

Q. Were they generally sold throughout the state? A. Yes sir.

The Court: How many did you sell?

A. I would say an average of five, six or seven hundred a month, at the time when they were first introduced in the latter part of the year of 1935. When the enforcement started, we sold as many as one thousand a month from the middle of September, 1935 to the end of the year, about a thousand a month.

Q. I will offer the circular in evidence as Defendant's Exhibit B.

The Court: What circular is that?

Mr. Miller: That last circular the witness was talking about as Defendant's Exhibit B.

(The circular was marked Defendant's Exhibit B in evidence.)

Q. I hand you an arm, Mr. Wallace, do you recognize this arm?

A. Yes sir, that is an arm signal we made in

(Testimony of Floyd E. Wallace.)

the latter part of 1935, and until the last three months we continued to make them. They were used on school buses and a different length is used for trucks. The shorter ones we have continued to make, they are used on school buses.

Q. Did you sell arms of that character in 1935?

A. Yes sir.

Q. And beginning when, what part of 1935?

A. The latter part of July or the middle of August.

Q. And sold generally throughout the State?

A. Yes sir.

Q. I will offer the arm in evidence as Defendants Exhibit with the next number.

(The arm was marked Defendant's Exhibit V in evidence.)

Q. Did you undertake to make any later style of arm for use on trucks or school buses, than those you have previously described?

A. Yes sir. [138]

Q. Describe the later type?

A. The later type of signal we made and offered for sale carried the same general appearance of that one, except it had—we had eliminated the two pieces which had formed the arrow. We used three reflectors on that arm instead of six.

Q. I will show you Plaintiff's Exhibit E is that the type of arm you have referred to?

A. Yes sir.

Q. You started making that type of arm when?

(Testimony of Floyd E. Wallace.)

A. The early part of 1938.

Q. When you speak of the early part, what do you mean by that?

A. Well, I would say, maybe in January or February.

Q. In January or February, 1938, when you started making that kind. Where did you get the reflectors you used in that exhibit?

A. From the Jose Glass Company.

Q. The Jose Glass Company?

A. That's right.

Q. Located where?

A. I believe that is at Point Marion, Indiana, but I am not sure.

Q. Approximately how many signal arms of that character, represented by Plaintiff's Exhibit E, did you manufacture?

A. About five hundred.

Q. About five hundred? A. That's right.

Q. You sold them, generally, did you?

A. That's right.

Q. Did you sell any to the Western Auto Supply Company? A. Yes sir.

Q. How long did you continue to make that style of arm?

A. I would say between four—maybe six months.

Q. Until about what time, what date, can you give the approximate month?

A. July or August, probably in July.

Q. 1938? A. That's right.

(Testimony of Floyd E. Wallace.)

Q. Did you submit that type of arm to the State Officials for approval? A. Yes sir.

Q. What reaction did you get to that?

A. Inspector Sharkey and I took this arm into the basement, and the Inspector stood back in [139] the hall about as far away as from here to the end of the building, in the dark and put the flashlight on it. I was told, "Well, Wallace, I don't believe it will cut the buck." Of course, not in those words. "I would suggest that you get that over to the test laboratory at Berkeley. They will tell you, very shortly, how much visibility the reflectors have." I went from the basement with the inspector, back to his office, and in the conversation he said: "Now, if you want something, I know is good, you contact the Guide Lamp Company. They will furnish you with a lens that I am positive will give the reflection necessary." I contacted the Guide Lamp Company, furnishing them with the same sketch of a lens as I have in this signal, and they, in their response to me, they said: "Well, now, we can't furnish you a signal lens about that shape. We are furnishing that type of lens to another account. Am I going too far, to make one answer, or will I continue?"

Q. Continue.

A. They said, however we are not in a position to furnish you a lens of this design, and shape. There is a signal out using that type of lens and you are apt to run into patent difficulties. They

(Testimony of Floyd E. Wallace.)

told me, you can see the patent list on this signal, if you want to investigate what signal it is.

Q. I will show you a letter which purports to be addressed to you dated April 5, 1938, which happens to be the date the plaintiffs design Patent was issued, is that the letter of response, you have referred to?

A. That is a letter from the Guide Lamp Company. I am not in the light here where I can read it, will you read it to me?

Q. This letter is on Guide Lamp Division of General Motors Corporation letter head, addressed Detroit Products Company, 210 Main Street, El Segundo, California, attention: Mr. Floyd E. Wallace. [140]

“Gentlemen:

We are in receipt of the copy of your letter of March 12 to Mr. J. C. Stimson of Chicago, together with attached sketch of the Stimsonite lens with the request that we furnish you quotations.

We note from this sketch that this type of lens is similar in design to one we have been furnishing another customer for several years. An inspection of the part in question reveals the fact there are many patent numbers listed on this article, and while we cannot state definitely if there are any patents on this particular design of lens, we are wondering if you would

(Testimony of Floyd E. Wallace.)

be interested in a lens of a different design in order that there will be no confliction between the lens you contemplate using and the one we are furnishing our customer? In any event, we would be pleased to have your further comments after you have had the opportunity of considering the above.

Very truly yours,

GUIDE LAMP DIVISION
GENERAL MOTORS CORPORATION

W. A. ROETTINGER

Sales Department." [141]

Q. Is that the letter you received?

A. That is the letter I referred to.

Q. You did send to him, with the letter of March 12, a sketch to indicate what kind of lens you wanted them to sell you?

A. I first tried to buy them from Stimson but I didn't get any response. I wrote to Guide Lamp Company, on Mr. Sharkey's suggestion, and, in the meantime, they had received from Stimson that letter there. They received a letter that they refer to that I wrote to Stimson.

Q. You sent a sketch to Stimson that was referred to them and that sketch showed the shape of the reflector?

A. That is right.

Q. What was the shape of the reflector?

(Testimony of Floyd E. Wallace.)

A. The shape of the reflector is the shape of this reflector here.

Q. That is Plaintiff's Exhibit E?

A. That is right.

Q. Now upon receipt of this letter from the Guide Lamp Company, did you submit to Guide Lamp Company any other sketch?

A. Yes, I did.

Q. Will you tell us what kind of a sketch you submitted to them?

A. The sketch I sent to Guide Lamp Company was a sketch of a lens about six inches long with a pointed end, a sort of an arrow end, to point direction.

Q. Did Guide Lamp Company prepare any drawing in conformity with this later sketch that had a pointed end on the reflector?

A. Yes sir.

Q. Now I will hand you a print or drawing and ask you if you recognize that? A. Yes sir.

Q. And what is that print. How did you happen to get that?

A. As I recall, the sketch I sent to them they sent back with a correspondence saying that the bars that make the molds, those molds are made up with a series of small bars, I had to draw in a 32nd of an inch narrower so that they could fill the full surface of the inner part of the lens and not have a flat space; otherwise they [142] could not put in an extra bar, they would have to take some off

(Testimony of Floyd E. Wallace.)

the lens, either widen it or narrow it a sixteenth of an inch, or widen the lens, I just forget the dimensions, but it was within an eighth of an inch. As I remember, it proved easier to narrow the lens that sixteenth or thirty-second of an inch, rather than to widen it.

Q. So instead of accepting your sketch——?

A. They made that small alteration, as I remember it they even widened the nose just a little to take care of some condition, so they could taper off on the line. I have correspondence somewhere about that.

Q. Did you receive that drawing you now have in your hand, from the Guide Lamp Company?

A. Yes sir.

Q. This drawing bears date of May 9, 1938, does that in any way, fix in your mind, approximately when it was, in relation to that date, you received this print?

A. Well, it would be about that time, because, as I recall, we didn't get started to operate, to make signals until maybe, oh maybe, thirty days later, something like that.

Q. After you received this drawing from Guide Lamp Company, did you then order lenses from Guide Lamp Company of the design shown on this drawing?

A. Yes sir.

Q. You say that was within thirty days after that, or about that?

A. There was no lost time. I believe they were giving me as fast service as is possible.

(Testimony of Floyd E. Wallace.)

Q. I will offer the drawing in evidence as Defendant's Exhibit——

(The drawing was marked in evidence as defendant's Exhibit W.)

Q. I will offer the letter of April 5, from the Guide Lamp Division in evidence as——

(The letter was marked in evidence as defendant's Exhibit X.)

Mr. Schapp: If your honor please, there is an objection to that as hearsay. They are trying to prove by that letter that Guide [143] Lamp Company thought that this lens wasn't an infringement on the Magarian lens. That is purely hearsay.

The Court: It doesn't make any difference what they thought about it. Objection overruled.

Q. Now, after you were able to obtain the pointed lens from Guide Lamp Company of the shape illustrated in the drawing, defendant's Exhibit W, did you thereafter continue to make any arms of the character of *Defendant's* Exhibit E?

A. No, sir.

Q. Did you take any steps to recall arms of the character of Plaintiff's Exhibit E?

A. Upon request, from Inspector Sharkey of the Division of Motor Vehicles—he advised me that lens wasn't satisfactory and that the department would so rule them off the road. Then I did recall them, as many as possible, as many as I could find, I believe I got almost all of them.

Q. Were you able to secure any back from Western Auto Supply?

(Testimony of Floyd E. Wallace.)

A. Almost three hundred, they bought a portion of them, as I remember, it is from memory, I am speaking. I have got somewhere in the invoices of that time, credit memorandums that we have issued for merchandise returned.

Q. When you secured those back from Western Auto Supply and others, did you substitute for those you got back, an arm of the character of Plaintiff's Exhibit D? A. Yes sir.

Q. Did you make any substitution of your arm, Plaintiff's Exhibit D, for Plaintiff's Exhibit E here, on trucks on the road? A. Yes sir.

Q. And since, you say about July that you discontinued E, you never made any more of these?

A. No sir.

Q. Will you state approximately when it was that the State Officials began to enforce this provision of the Motor Vehicle Code that you say was enacted in 1925?

A. The actual enforcement of the Code relative to signals was started in 1931 upon school buses. [144] The State Board of Education insisted at that time that all school buses must have a signalling device, front and rear of mechanically, manually operated, mechanically controlled, not electrical. The Highway Patrol Department enforced that Code on that portion of the operators at the request of the State Board of Education.

Q. That was when they began to enforce the use of the arm on school buses?

A. Oh, signals on trucks. That was in 1935, the

(Testimony of Floyd E. Wallace.)

second enforcement came after, thousands of signals had been sold, then the Department saw the benefit of signals on trucks, the Code was revised to word that "any vehicle operating on the highway one half hour after sundown until one-half hour before sun-up, shall have a mechanical or electrical device that will be illuminated by reflex reflectors or electrical bulbs." That is about the wording of it. That was enacted when the body convened and enforcement took place about sixty or ninety days thereafter, which was about September of 1935, and at that time our business jumped double.

Q. You did notice a marked increase in the sale of arm signals after September, 1935?

A. Yes sir.

Q. Continuing through 1936?

A. Yes sir, and to this date.

Mr. Miller: That is all. You may cross-examine.

Cross Examination

Mr. Schapp: Q. Do you understand the patents that were offered in evidence, here, against the signalling arms and against plaintiff's patent?

A. I have read them, in my counsel's office.

Q. You have been in the business of manufacturing signal arms for some thirteen years?

A. About twelve.

Q. Twelve or thirteen years?

A. That's right.

Q. Are you familiar with all the arms that have been on the market during that time, preceding 1935, let us say?

(Testimony of Floyd E. Wallace.)

A. Yes sir, with most of them, I have a general idea. [145]

Q. Now, Mr. Wallace, in all your experience, and all the information you have in your mind on signalling arms, have you ever run across a signalling arm that existed prior to, say, November, 1935 that looked exactly like this arm, Plaintiff's Exhibit C?

A. Prior to 1935?

Q. Yes?

A. Will you state that question again?

Q. Did you ever run across any signalling arm that existed prior to November 1935, that looked exactly like the signalling arm, Plaintiff's Exhibit C?

A. No, sir, I have seen some that looked very similar to it.

Q. In all your experience with signalling arms, did you ever run across a lens used in a signalling arm that looked just exactly like the lens that forms part of Plaintiff's Exhibit C?

A. I have seen some that looked similar to it.

Q. Similar to it, I mean exactly like it?

A. Exactly like it, no.

Q. What is the nearest lens you have even seen that is nearest to this?

A. That lens, similar to that was commonly used in tail and stop lights.

Q. They were oblong lenses?

A. Not necessarily, they were oblong and they were diamond shape.

Q. When did you see those?

A. Oh, I have seen some about in 1932.

(Testimony of Floyd E. Wallace.)

Q. Just describe those lenses, will you?

A. They were possibly a bit wider than what you have there. They were used in stopping, in a left and right stop taillight combination that was made back as far as 1925.

Q. Were they stimsonite?

A. No, did they have to be?

Q. Well, I asked you just exactly like this?

A. No.

Q. Prior to November 16, 1935, which is two years prior to the application date, did you ever run across a plate that would look exactly like this plate, I am showing you now, which forms a part [146] of Plaintiff's Exhibit C?

A. One similar to that.

Q. Not exactly like it?

A. Not exactly, so similar it would take no imagination to continue with that.

Q. I am not asking an opinion, I just asked you whether you run across—— A. Not exactly.

Q. Did you ever run across a washer exactly like this, or a separator, that was in existence prior to November 16, 1935?

A. Let me examine that please. Yes, that is just a piece of tar paper.

Q. Did you ever run across a washer used in a signalling arm of this shape? A. No.

Q. Now, Mr. Wallace, I will ask you when you adopted this arm, Plaintiff's Exhibit E, which as I understand it you adopted on or about January, 1938, from your testimony? A. That is right.

(Testimony of Floyd E. Wallace.)

Q. Were you familiar with the arm of Magarian, as exemplified in Plaintiff's Exhibit C?

A. No sir.

Q. Do you remember, Mr. Wallace, in response to a question asked in an interrogatory, you made this answer? (Shows interrogatory and answer to witness)

A. Yes, I remember that answer. I said I wasn't sure if I knew of it.

Q. At that time, did you know Mr. Magarian?

A. No, I never had met the gentleman.

Q. Did you know about Mr. Magarian's business in Fresno, did you know there was such a concern as Industrial Scientific Company in Fresno?

A. Yes sir.

Q. Were you familiar with the market at that time? Of course you had been in business in signalling arms for about ten years, at that time. ...

A. Yes sir, I was familiar with the market at that time.

Q. Did you hear the testimony of Mr. Magarian that at that time there must have been some two thousand of those signal arms on [147] the market all through the State of California and through the Western States? Did you hear Mr. Magarian testify to that?

A. No I don't imagine I did hear him say that during his testimony.

Q. You mean to say here, that the two thousand of these signalling arms on the market, right within

(Testimony of Floyd E. Wallace.)

your own territory, that you didn't know about this signalling arm when you adopted yours in January, 1938?

A. There is no proof there was two thousand of those out.

Q. Is that your testimony?

A. That is my answer to your question.

Q. How did you happen to develop this arm, Plaintiff's Exhibit E?

A. I took the signal arm that I had made since 1931 and cut the lips—will you hand me that arm (indicating) so I can go on intelligently?

Q. Is this the one?

A. That one (indicating) is the first one. Give me either one, it doesn't make any difference. To develop the arm I have merely eliminated——

Q. (Interrupting) If your Honor please, if I may interrupt, I said two thousand, there were twenty thousand arms according to the testimony, at that time.

A. (continuing) I merely took this edge here off, and inserted three lenses therein.

Q. It was entirely, purely accidental, your development of the same arm as Mr. Margarian had on the market, with twenty thousand on sale and had been marketed in the State of California?

A. I don't agree there are twenty thousand. The testimony wasn't all brought out here in Court this morning.

(Testimony of Floyd E. Wallace.)

Q. Mr. Wallace, isn't it a fact that you are the only one that infringes the Magarian arm?

A. I don't infringe the Magarian arm.

Q. That you are the only one that places on the market an arm similar to Magarian or similar to the two arms here?

A. To the best of my knowledge I am the only part of an organization that [148] manufactures an arm of that type, yes sir.

Q. Haven't you rather enjoyed the benefit of the patent, during these last two or three years, you have had it on the market?

A. What do you mean by enjoyed?

Q. The benefit of the monopoly that no one else infringed——

A. I wouldn't say I did.

Q. That you were able to ride along with Mr. Magarian under his patent protection and keep everybody else out?

A. I would say I developed the signal business up to where the Highway Patrol noticed it, revised their Code, because we are one of the thirteen states in the United States that require arm signals. I made them eight years before any other signals were sold to speak of. The enjoyment that I received from the signal business today is from the efforts of going to one truckman and getting him to buy a signal, and to another, until the Highway Patrol noticed it and did pass a law that would enforce the Code.

(Testimony of Floyd E. Wallace.)

The Court: You contend that was done through your efforts?

The Witness: Yes, sir. I don't believe there was a signal made until 1937, that any more than fifty or seventy-five of them were sold, while I have my figures, a stack that high (indicating) that were bought from me.

The Court: Prior to the time of the application of this patent?

The Witness: Yes.

Q. You had no intention of riding along with Mr. Magarian's protection?

Mr. Miller: I object to that question.

The Court: Objection sustained.

Q. Did you write this letter?

A. Will you read the letter, please, my eyesight is bad.

Mr. Miller: I think we can stipulate that he did.

[149]

Mr. Schapp: I will read it into the record, a letter from Detroit Products Company, addressed to Industrial Scientific Company, Fresno, California, attention: Mr. Masick C. Magarian:

"Dear Mr. Magarian:

My attorney has informed me that he has received word from Mr. Schapp, your attorney in San Francisco, in regard to your claim that I am infringing on your so called patents.

As you well know, I am not infringing on any rights of yours, and consequently will pay you

(Testimony of Floyd E. Wallace.)

nothing, but there is one matter that I would like to call to your attention before you yourself undertake the expense of a law suit and force me to do the same.

You have now what purports to be patents pertaining to signal arms, but you and I both know that all your claimed patents find their origin in articles that I have been making for a long time. Now, if you insist on going to Court and the Court is shown this, they will declare your patents invalid, and, of course, the only consequence of this is, whereas now no manufacturer that might be your competitor and mine, not knowing the history of your claimed inventions, will risk entering the field, but once this matter is brought before the Court and the same are found to be invalid, instead of having one competitor you will have any number of them.

I, therefore, suggest that you reflect on the origin of your devices and the consequence of having the Court declare them to be invalid before undertaking to sue me.

Yours truly,

DETROIT PRODUCTS CO.

FLOYD E. WALLACE

By FLOYD E. WALLACE."

[150]

A. That is my dictation.

Q. That is your dictation?

A. Yes.

(Testimony of Floyd E. Wallace.)

Q. I will offer this letter in evidence, and will ask the same be marked Plaintiff's Exhibit——

The Court: For what purpose is it offered?

Mr. Schapp: It is offered to show the mental attitude of Mr. Floyd E. Wallace, who was perfectly willing to enjoy the patent protection of the patent, but not to pay tribute to it.

The Court: I don't think the letter is what you think it is.

Mr. Schapp: The letter clearly indicates it in my opinion, the letter speaks for itself.

The Court: It doesn't clearly indicate at all that he is to enjoy somebody else's patent. He wrote a straightforward letter to your client.

Mr. Schapp: He says in substance here, that "you and I together can enjoy the patent".

The Court: What he says is maybe true.

Mr. Schapp: But at the same time, he is perfectly willing to take the benefit of the patent without doing anything about paying tribute to the patent.

The Court: If what he says is true, your client has no patent.

Mr. Schapp: But still he is willing to ride along with the protection of the patent.

The Court: I don't see it that way at all. I don't think that is an objectionable letter. It is such a letter as a man in this witness's place might write to one of his competitors. Under the circumstances

(Testimony of Floyd E. Wallace.)

I don't think he should be criticized for writing it. Let it go in for what it is worth.

(The letter was marked Plaintiff's Exhibit V in evidence.)

The Court: It doesn't bear the interpretation you sought to [151] lay for it, that is my thought about it. It doesn't bear such an interpretation, as one can say this witness, here, is trying to ride in prosperity on the patent obtained by your client. I don't think it does at all, not under the circumstances. The evidence here shows this man was a pioneer in the business of making signals, that is undisputed.

Mr. Schapp: That is undisputed, but, at the same time, the evidence shows that from 1927 to 1938, he made all sorts of different models and in 1938——

The Court: And some of them were quite similar to the one your client obtained a patent on. Well, I think there is a similarity in the early signals made by the witness and the signal which has been made by your client, for which he obtained his patent. There is a similarity but the serious question appears to me to be, who was the first to invent it.

Mr. Schapp: Very well, your Honor, that's all.

The Court: I don't want to shut you off. Don't let anything I said shut off your cross examination, if you have any. You make your record the way you think it should be. Don't let me stop you. The Court can make remarks during the course of a trial

(Testimony of Floyd E. Wallace.)

that sometimes mislead counsel, I don't wish to do that.

Mr. Schapp: I have no further questions to ask.

Mr. Miller: That is all.

Mr. Schapp: Plaintiff rests.

Mr. Miller: Defendant rests.

(Thereafter, after discussion between the Court and attorneys for both parties, and with the consent of the attorneys for both parties, the Court set aside the order granting the motion to make T. A. Mitchell a party defendant in the case, with the understanding that the motion was to be argued on briefs. Thereafter the case, [152] plaintiff's motion to make T. A. Mitchell a party defendant, and defendant's motion to dismiss the case for lack of jurisdiction, were submitted on briefs to be filed in 20, 20 and 10 days.)

[Endorsed]: Filed Sept. 19, 1940. [153]

Tuesday, October 15, 1940

9:30 o'clock A.M.

The Court: You may proceed, gentlemen.

Mr. Schapp: I would like to recall Mr. Magarian.

MASICK MAGARIAN,

Recalled in his own behalf; previously sworn.

The Court: Do you wish Mr. Magarian sworn again?

Mr. Naylor: Not necessary your Honor.

Mr. Schapp: Q. Mr. Magarian, did you at any time submit your patented signal arm to the Motor Vehicle Department of the State of California for approval? A. Yes, sir.

Q. About when did you do that? Talk out loud.

A. We submitted it about in the middle part of 1936, around in August.

The Court: You say "of the State of California"?

The Witness: Motor Vehicle Department.

Mr. Schapp: Q. Did you receive a reply from the Department of Motor Vehicles for the State of California? A. Yes, sir.

Mr. Naylor: If the Court please, to save any unnecessary objections and yet to preserve a clear record, I wonder if we could fix a little more definitely just what arm was submitted to the State for approval?

The Court: Yes.

Mr. Naylor: Referring to exhibits in the case.

The Court: Will you do that, Mr. Schapp?

Mr. Schapp: Yes.

Q. Will you please state what you submitted to the Motor Vehicle Department for approval?

A. Are you referring to the three-window type of arm? [155]

(Testimony of Masick Magarian.)

Q. You describe it.

The Court: You might step down, if you wish, Mr. Magarian, and look at those exhibits with Mr. Schapp.

The Witness: We had a number of arms approved. Is this the one you are talking about?

Mr. Schapp: Yes; whatever you submitted.

A. Well, we had submitted—this was the first one submitted.

The Court: What is that exhibit?

The Clerk: Exhibit A.

The Witness: Exhibit A.

The Clerk: Plaintiff's Exhibit A.

The Court: When was that submitted?

A. That was submitted in 1934, and then later on we developed this three-window type.

The Clerk: Plaintiff's Exhibit C.

The Witness: Exhibit C. This was presented to the Department in 1934, around in August—or 1936, I should say.

The Court: 1936?

A. That's right. We got our approval in December of 1936.

Mr. Schapp: Q. I will show you here a photo-static copy of a letter from the Department of Motor Vehicles, State of California, addressed to yourself, and will ask you whether you recognize the same. The original of this letter, your Honor, is in your Honor's file.

The Court: The original is?

(Testimony of Masick Magarian.)

Mr. Schapp: Yes.

The Witness: Yes. This is our letter of approval dated December 4, 1936.

Mr. Schapp: Q. Did you receive that letter through regular mails? A. Yes, sir.

Mr. Naylor: May I see that, Mr. Schapp? [156]

The Court: Do you know what that exhibit is in the file? You say it is already in evidence?

Mr. Schapp: Not in evidence. It was submitted with my motion to submit. It was attached to my motion.

The Court: Well, then you are offering it in evidence now?

Mr. Schapp: Yes. I do offer it in evidence now.

The Court: Have you seen it?

Mr. Naylor: Yes, I have seen it, your Honor. I just want to check it.

Mr. Schapp: Mr. Naylor has a photostatic copy.

The Court: No objection to the photostat?

Mr. Naylor: No objection to the photostat, your Honor, but I will have to object to the exhibit, itself, for the obvious reason it is incompetent, irrelevant, and immaterial, and constitutes hearsay.

The Court: Yes. Overruled. Let it be received.

(The photostat was marked "Plaintiff's Exhibit W.")

The Court: That letter of December 4th, is it——

Mr. Schapp: December 4th.

The Court: December 4, 1936.

Mr. Naylor: If the Court please, to avoid repeti-

(Testimony of Masick Magarian.)

tion in the record, may it be understood this objection of mine will stand to all the questions put to the witness on this exhibit, and the ruling of the court will be the same?

The Court: All right.

Mr. Naylor: Thank you. [157]

Cross Examination

Mr. Naylor: Q. Mr. Magarian, you say that the first arm which was submitted to the State for approval in 1934 was Plaintiff's Exhibit A: is that correct? A. That's right.

Q. Was it in a form in which you now see it?

A. Yes.,

Q. Was that particular arm approved or disapproved? A. It was approved.

Q. It was approved? A. Yes.

Q. Was it approved in its entirety?

A. Yes.

Q. And the next one was Plaintiff's Exhibit C; is that correct? A. That's right.

Q. Was it submitted in this form?

A. Yes.

Q. And this is the arm that was submitted in the middle of 1936, [158] you said, I think.

A. Yes, around in August, I think it was.

Q. Did it have an operating mechanism on it?

A. Yes.

Q. At the time of submission? A. Yes.

Q. Can you describe that operating mechanism?

(Testimony of Masick Magarian.)

A. The operating mechanism submitted at that time had a handle with three notches.

The Court: When was that?

Mr. Naylor: That is the August, 1936 arm, your Honor, Plaintiff's Exhibit C.

The Witness: Well, we have the sample here that would show it. It is pretty hard to describe it in just words.

Q. Well, will you please show it? I would like very much to see that. Would you like this exhibit to use with it?

A. Well, you want me to describe the control.

Q. Yes, describe the arm exactly as in the form in which it was submitted.

A. Well, the arm, of course, operates in a vertical position. It has a bracket that fastens to the cab of the truck and this angular arm is controlled by the mechanism through a pulley and chain, and this control mechanism fastens inside of the cab in a horizontal position, approximately in this position, relative to the driver. It has these three notches to elevate the arm to the three different positions required by the State law.

Q. By the Motor Vehicle Code.

A. Yes, sir.

Q. The three approved positions.

A. The three required positions, which are the stop position, left turn and right turn, which is above horizontal.

The Court: Was that the whole of the device submitted by you?

(Testimony of Masick Magarian.)

A. Yes.

Q. It had an arm attached to it, did it not?

A. Well, the arm is right here.

Q. I understand that, but Mr. Naylor has asked you to show him the [159] device you submitted to the State in August, 1936.

Mr. Naylor: August, 1936.

The Court: Yes.

Q. What device was it?

A. This unit, here, a combined unit.

Q. I see. With the arm and the other operating device.

A. Yes. The entire approval pertains to the arm, control mechanism, pulley and chain and so forth.

The Court: I see.

Mr. Naylor: Q. Can you describe just what led to the change in this operating mechanism, the operating mechanism which formed a part of Plaintiff's Exhibit C at the time of its submission in August, 1936?

A. Yes. May I have that mechanism? This, as I said, was our first device that we presented to the State for approval, and we manufactured this in 1935, approximately 3000 units. **This was approved** by the State and later on we made a change.

Q. You are referring now to Plaintiff's Exhibit A, are you not?

A. Yes. Plaintiff's Exhibit A, this mechanism fastens on the outside, in that position, and it was operated by this cable which fastened to this an-

(Testimony of Masick Magarian.)

gular arm. As you pulled this cable from the inside of the cab, there is a catch in there which holds the arm in the left turn position, and after you have made your turn a second pull releases it. That was the only position we had on this arm that would actually stay, that is, a definite position which held. For a stop position, we didn't have a catch, we simply held it in that position, and for a right turn we just pulled it up.

Q. By "we held," you mean the operator held it in the other two positions required by law; is that correct? A. Yes.

Q. In other words, you had one catch for a left turn position only, [160] none for stop and right hand turn?

A. No. The argument we had for that purpose at that time, after discussing it with Inspector Sharkey, of the Motor Vehicle Department, the argument was that the left turn position was the most important position, the most dangerous turn to make, and the other two signalling positions were not as important, so he let me manufacture this on that basis, which was perfectly all right; I manufactured it. Later on he didn't exactly like—the law was, I think, reinforced, and he wanted me to use all three positions.

The Court: That was the same year, wasn't it; 1936?

A. No. It was 1936, that's right. He wanted to have three different positions and this mechanism,

(Testimony of Masick Magarian.)

the way it was designed, did not have any room inside to have all those three positions, so we made another controlling mechanism which preceded this one that you have asked me to describe.

Mr. Naylor: Q. Now, so the record will be clear, you are referring to the operating mechanism on Plaintiff's Exhibit C, are you not, in that last statement you made?

A. Yes. However, as I say, from this we developed another control mechanism which is shown in our catalog at that time, and it was different from this device.

Q. Will you describe that, briefly?

A. Yes. Maybe I could show it much easier by a sketch; it won't take much time.

The Court: Go ahead.

The Witness: I am going to show you now the control mechanism that came after this first model.

Mr. Naylor: Plaintiff's Exhibit A.

A. That's right. The control mechanism consisted of a disc, a flat disc approximately three inches in diameter. I will try to draw a perspective of it. This disc was fastened to a [161] bracket riveted on. These are the two holes for rivets. This disc was riveted to this bracket by two little rivets here. It had a hole here through which a handle operated, straight handle, and this handle had two depressions on each side of the axis. Showing the handle this way, it had a shaft here. Then it had two depressions out in the middle, like that. These

(Testimony of Masick Magarian.)

two depressions fitted into depressions in the disc, three sets, three pairs on this disc, and the handle, say in the vertical position, there. Then from the first position it dropped into these recesses and then grabbed on again, and showing the cross-section here, the disc at that position, this bracket came around approximately in that position, and then the spring, here, with a washer and a cotter pin here, that spring gave a tension on the handle against the disc as you rotated it, which simply snapped into the different positions. We have shown that in the catalog.

Mr. Naylor: Your Honor, may I suggest for the sake of clarity of the record, that Mr. Magarian make just a little pencil sketch of what he has made on the blackboard?

The Court: Yes, do that. Make a pencil sketch here on the desk of that and it can be offered in evidence. Make a pencil copy of that.

Mr. Naylor: I suggest, to save time, that he might make it even after this session of court is over.

The Court: Make what?

Mr. Naylor: In order to save time I might suggest Mr. Magarian be permitted to make it after the session of court is over.

The Court: You can make it when you get home. Make one and mail it in to the Clerk.

The Witness: I can make it now. [162]

The Court: Is it important, Mr. Naylor?

Mr. Naylor: Just for the sake of completeness of the record, your Honor.

(Testimony of Masick Magarian.)

The Court: Well, you can make it now if you have some paper there.

The Witness: I can make it right after the trial.

The Court: Very well.

The Clerk: It will be Defendant's Exhibit Y.

The Court: The last was W.

The Clerk: Your Honor, in this case both plaintiff and defendant's exhibits are lettered on account of the fact they were introduced on depositions.

The Court: Very well. Defendant's Exhibit Y.

(The sketch to be marked "Defendant's Exhibit Y.")

The Court: You will then furnish for the record a drawing like that on that piece of paper.

The Witness: Yes.

Mr. Naylor: Q. Now, Mr. Magarian, was this Defendant's Y approved by Inspector Sharkey?

A. Yes.

Q. When was that?

A. That was before—that was the beginning part of 1936 was when we started to make those. I don't remember the exact date.

Q. When thereafter did you adopt the control mechanism which forms a part of Plaintiff's Exhibit C?

A. This one was adopted after we had manufactured approximately fourteen thousand of these units during the year 1936.

The Court: Referring to what, Plaintiff's Exhibit A?

(Testimony of Masick Magarian.)

The Witness: To the exhibit.

The Court: C?

The Witness: No, I don't think, your Honor, that—— [163]

The Court: Exhibit Y?

Mr. Naylor: Went from Y to A, then, is that correct, Mr. Magarian?

A. Well, I am a little confused.

Q. You went from Defendant's Exhibit Y to the control mechanism on Plaintiff's Exhibit A?

A. That was first, and then this came.

The Court: Q. You say you made fourteen thousand of them, according to this——

A. Defendant's Exhibit Y. That was during the year 1936. Then in December of 1936 we obtained an approval on this type. I don't know if you have a number on it or not.

The Court: What is that? Has that been offered in evidence, Mr. Naylor?

Mr. Naylor: No, it is not in evidence yet, your Honor. I think perhaps we will when we are through with it.

The Court: Yes.

Mr. Naylor: Q. You say that the request for Approval of the controlling mechanism on Plaintiff's Exhibit C was made in the middle part of 1936. Will you refer to Plaintiff's Exhibit W and see if you can check that date as to the time at which the application was approved for you?

(Testimony of Masick Magarian.)

A. I don't think I understand your question. This approval is for Exhibit C. This approval refers to this one.

Q. Yes, with the control mechanism that you have referred to. A. Yes.

Mr. Naylor: I wonder if it wouldn't be best to offer the controlling mechanism of C as C'.

The Court: Very well. Let it be so marked, C'.

(The controlling mechanism of Plaintiff's Exhibit C was marked "Plaintiff's Exhibit C'.")

Mr. Naylor: Will you refer to Plaintiff's Exhibit W and [164] state if you can from that when the application was approved, of the arm, Plaintiff's Exhibit C-C', was made to Inspector Sharkey?

A. Date of letter of approval is December 4, 1936.

Q. Does that exhibit show the date on which the application was made by you?

A. Yes, I think it does; August 20, 1936. I am referring to the report of test.

Mr. Naylor: I have here a mechanism I would like marked Defendant's Exhibit next in order for identification.

(The mechanism was marked "Defendant's Exhibit Z for identification.")

Mr. Naylor: Q. I show you Defendant's Exhibit Z for identification and will ask you if you have ever seen that device before.

A. Yes, I have seen it.

Q. Where did you see it first?

(Testimony of Masick Magarian.)

A. I saw this approximately, not quite two years ago, when one was returned from one of our jobbers by mistake, I think the lenses were broken on it, and they had included that and shipped it back to us. That was the first time.

Q. It was a part of a signal arm, was it not——

A. What?

Q. That was a part of a signal arm when you first saw it? A. Well, it was part——

Q. You said the lenses were broken, what do you mean?

A. Well, the arm, when I first saw this the jobber had returned the arm, which was Detroit Products, and in that package was this control.

Q. You say that was when?

A. It had a little casting, I think, for the chain, which our pulley takes the place of.

Q. When was that?

A. It was about not quite two years ago, as I remember.

Q. Can you fix a more definite date than that?

A. Well, I can't give you an exact date, because, as I say, it was just about two [165] years ago; I know it came back, and it wasn't ours. I remember that definitely, about two years ago.

The Court: Well, did you have anything in your records to show the receipt of it, or the return of it to the Detroit people?

A. If I am not mistaken, our representative called, and I showed it to him and he said to just

(Testimony of Masick Magarian.)

send it back and he would take care of it. I might have some correspondence, but I can't really say about it. But it was a mistake on their part.

Mr. Naylor: Q. Then we are to understand that you have never seen that operating mechanism——

A. No, never seen——

Q. Just a moment—as a part of a signal mechanism. A. No.

Q. More than a little less than two years ago.

A. No.

Q. Do you want us to understand, then, you had not seen Defendant's Exhibit Z for identification at the time you changed to Plaintiff's Exhibit C'?

A. No, sir.

Q. As a controlling mechanism? A. No, sir.

Q. You knew at that time, however, that Detroit Products Company was in the market and making signal arms, did you not? A. Yes.

Q. You had seen their signal arms, hadn't, you?

A. Seen the arm on the trucks.

Q. You had also seen the operating mechanism, hadn't you? A. No, I had never checked into it.

Q. You had never examined the operating mechanism?

A. No, because in our development work we came through the processes that are indicated and what we endeavored to do, and the reason we changed to this type was because after we had a number of those, around fourteen thousand, we did have some complaint about the humps wearing off,

(Testimony of Masick Magarian.)

and they weren't definitely necessary after they were out, so from there we changed over to this type. [166]

Q. Plaintiff's C? A. That's right.

Q. Is that correct? A. Yes.

Q. But prior to making that change you will have us to understand you had not seen the Detroit Products arm? A. Yes.

Q. Defendant's Exhibit Z for identification.

A. I had seen the arm hanging on trucks, but I never checked—as I say, I had seen the arm——

Q. But you never examined it?

A. I never investigated to see what he had, because all our development work was done then.

Mr. Naylor: That is all.

Mr. Schapp: Your Honor please, I would like to make one statement to your Honor, that, of course, this bracket is not in issue in the present proceeding.

The Court: Yes. Is that all, gentlemen?

Mr. Naylor: I would like to recall Mr. Wallace for one question.

FLOYD E. WALLACE,

called for Defendant; sworn.

Mr. Naylor: Q. Mr. Wallace, I show you Defendants' Exhibit Z for identification in this case, and ask you if you are familiar with that.

A. Yes.

Q. Will you explain what you know about it?

A. I first made this signal control in the fall of 1928.

Q. Has it been used by your company since that time?

A. This is the only type of device we have made since 1928.

Q. Since 1928?

A. Since 1928, and in the year of—is it permissible to continue, is that what you want?

Q. Yes.

A. From the year 1928 until 1931, or '32, about '32, we [167] sold about 3000 of these.

Q. So the record will be absolutely clear on that point, when you say "We sold these", you mean some kind of a signal arm of which Defendant's Exhibit Z was the controlling mechanism?

A. Yes. I think it was in that green catalog sheet; you have a catalog sheet here of a stuffer, or an envelope stuffer that will show a picture of this control.

Q. Is that control mechanism being used today by Detroit Products? A. Yes.

Mr. Naylor: That is all. I will offer that in evidence.

(Testimony of Floyd E. Wallace.)

The Witness: It has been used; we have never had any other type of control than this, and I would say that between 1928 and 1936 that there was probably eight or ten thousand of them sold, and in use in trucks and school buses in the State of California.

Mr. Naylor: I will offer Defendant's Exhibit Z for identification in evidence.

The Court: It may be in evidence.

(The mechanism referred to was received in evidence and marked "Defendant's Exhibit Z.")

[Endorsed]: Filed Dec. 30, 1940. [168]

[Endorsed]: No. 9811. United States Circuit Court of Appeals for the Ninth Circuit. Masick C. Magarian, Appellant, vs. Detroit Products Company, a copartnership composed of Floyd E. Wallace and Percy J. Elwell, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed May 5, 1941.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

Civil Action

No. 9811

MASICK C. MAGARIAN,

Plaintiff and Appellant,

vs.

DETROIT PRODUCTS COMPANY, a copartner-
ship composed of Floyd E. Wallace and Percy
J. Elwell,

Defendants and Appellee.

STATEMENT ADOPTING POINTS ON
APPEAL

Comes now the Appellant above-named, and
adopts as the points to be relied upon on Appeal,
the statement of such points appearing in the Dis-
trict's Clerks Transcript of Record on file herein.

A. SCHAPP

Attorney for Appellant

Date: May 3rd, 1941.

Receipt of a copy of foregoing Statement Adopt-
ing Points on Appeal is hereby admitted this 5th
day of May, 1941.

JAS. M. NAYLOR

Attorney for Appellee.

[Endorsed]: Filed May 5, 1941. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF PARTS OF
THE RECORD TO BE PRINTED

1. Bill of Complaint (Page 1 of Record on Appeal)

2. Amended Answer (Page 4)

3. Order Relative to Pre-Trial Conference (Page 12)

4. Statement of Prior Patents that Defendants will specifically rely upon at the time of Trial. (Page 14)

5. Order for Judgment on Findings (Page 16)

6. Findings of fact and Conclusion of Law (Page 17)

7. Final Judgment (Page 23)

8. Notice of Appeal to Circuit Court of Appeals (Page 25)

9. Undertaking for Costs on Appeal (Page 27)

10. Statement of Points (Page 29)

11. Order to Forward Originals (Page 34)

12. Reporter's Transcript of Trial Proceedings had on August 1st and 2nd, 1940, except as follows:

Omit from Page 9, line 27 to Page 11, line 28;

Omit from Page 12, line 3 to Page 14, line 3;

Omit from Page 14, line 8, to Page 15, line 12;

Page 23, line 7, change "later" to latter;

Page 25, line 6, change "space" to spacing;

Omit from Page 35, line 2 to Page 40, line 25;

Omit from Page 41, line 23 to Page 45, line 24;

Omit from Page 51, line 29 to Page 53, line 3;

Omit from Page 53, line 18 to line 6 of the next page, to the period;

Omit Page 54, line 24, to Page 56, line 4;

Page 62, line 29, change "and" to: in their

Omit Page 66, line 28 to Page 70, line 12;

Omit Page 70, line 28, beginning with: "I will show you" to Page 72, line 7;

Omit Page 73, line 7 to Page 86, line 5;

Omit Page 86, line 30, to Page 88, line 4 to and including "recess."

Page 104, line 21 to Page 112, line 3.

13. Reporter's Transcript of Proceedings had in Open Court on Tuesday, October 15th, 1940, except as follows:

Omit from Page 115, line 27 to the next page, line 17; (Please note that Pages 114 and 115 appear twice in the transcript, and the portion to be omitted is found Page 115, first occurrence, and Page 114, second occurrence)

Omit from Page 116, line 9, to Page 123, line 17;

Omit from Page 124, line 2 to Page 125, line 4;

14. Statement Adopting Points on Appeal

15. This Designation

16. Clerk's Certificate.

All the physical exhibits in this case have been transmitted to the Court of Appeals. In addition, the Appellant will supply to the Court of Appeals five copies of Patent Books, each to include, the two patents in issue, No. 2,153,634 and D-109,148, The Elliott Patent, No. 1,415,817 and the Costen-

bader Patent, No. 1,673,865, which latter are the only two prior patents specifically applied in the Findings of Fact.

A. SCHAPP

Attorney for Appellant

Date: April 30, 1941.

Receipt of a Copy of the foregoing Appellant's Designation of Parts of Record to be Printed is Admitted this 5th day of May, 1941.

JAS. M. NAYLOR

Attorney for Appellee.

[Endorsed]: Filed May 5, 1941.

[Title of Circuit Court of Appeals and Cause.]

APPELLEES' DESIGNATION OF ADDITIONAL PARTS OF THE RECORD UNDER CCA RULE 19 SUBDIVISION 6

Now come the appellees and designate the following additional parts of the record which they think material under Rule 19, subdivision 6 of the Rules of the Circuit Court of Appeals for the Ninth Circuit.

1.

The depositions of L. E. Smith and H. E. Smith, and the stipulation as to the testimony of Frank Fred Hartman included in the official copy of the depositions of L. E. Smith Et Al, pages 3 to 20, inclusive.

2.

The deposition of Cecil L. Armstrong included in the official copy of the deposition of Cecil L. Armstrong, pages 3 to 10, line 15.

3.

The deposition of Wallace R. Lynn included in the official copy of the depositions of Wallace R. Lynn and T. A. Mitchell pages 3 to 27, line 22, inclusive, apparently introduced in evidence by plaintiff's counsel at page 59, lines 13-15 inclusive, of the transcript of proceedings on August 1 and 2, 1940.

4.

In the reporter's transcript of trial proceedings had on August 1 and 2, 1940,

Include page 9, line 27 to page 11, line 28;

Include page 12, line 3 to page 14, line 3;

Include page 35, line 2 to page 40, line 25;

Include page 41, line 23 to page 45, line 24;

Include page 51, line 29 to page 53, line 3;

Include page 53, line 18 to line 6 of the next page to the period.

Include page 54, line 24 to page 56, line 4;

Include page 66, line 28 to page 70, line 12;

Include page 70, line 28, beginning with "I will show you" to page 72, line 7;

Include page 73, line 7 to page 86, line 5;

Include page 86, line 30 to page 88, line 4 to and including recess; and

Include page 104, line 21 to page 111, line 25.

5.

In the reporter's transcript of proceedings had in open court on October 15, 1940

Include page 116, line 9 to page 123, line 17

Include page 124, lines 2 to 19.

It is not clear from appellant's designation how the matter of the patent books is to be handled. Appellees suggest, however, that the total number of patent books be not less than six copies, one for each of the Judges of the Circuit Court of Appeals, and one for plaintiff-appellant's counsel and two for defendants-appellees' counsel, the defendants-appellees being represented by two attorneys located in San Francisco and Los Angeles, respectively.

The appellees also designate that such patent books if they be in the nature of exhibit books, include in addition to the patents mentioned in appellant's designation, copies of United States Patent to

| | |
|-----------|-----------|
| Kimbrough | 1,600,887 |
| Stimson | 1,807,350 |
| Reynolds | 1,873,033 |
| Carter | 1,659,082 |
| Miller | 1,860,719 |

and the British Patent to Dennis 341,652, these being the patents listed in the defendants' "Statement of Prior Patents That Defendants Will Specifically Rely Upon at the Time of Trial (page 14)."

Appellees also designate that in view of plaintiff's specification of points 3, 4, 5, 6, and 7, that there be reproduced in the exhibit book, defendants' Ex-

hibits E, F, G, J, check stub for check No. 11086 in defendants' Exhibit K, and defendants' Exhibit L.

FRED H. MILLER

Attorney for Appellees

Service by personal delivery of copy of the within appellees' designation of additional parts of the Record at the office of appellant's attorney, this 14th day of May, 1941.

JAS. M. NAYLOR

Attorney for appellee

[Endorsed]: Filed May 14, 1941. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLANT'S SUPPLEMENTARY
DESIGNATION

Please add the following exhibits to the Book of Exhibits:

1. Plaintiff's Exhibit K (Blue Print of April 25, 1934)
2. Plaintiff's Exhibit O (Blue Print E 3559)
3. Plaintiff's Exhibit W (Letter 12/4/36; first page only; Department of Motor Vehicles of the State of California to Masick C. Magarian)

4. Defendants' Exhibit Y (only the Sketch by Witness Magarian)

Respectfully

A. SCHAPP

Counsel for Plaintiff and Appellant.

Receipt of a copy of the foregoing Plaintiff's Supplementary Designation is admitted this 5th day of August, 1941.

JAS. M. NAYLOR

Counsel for Defendants and Appellee.

[Endorsed]: Filed Aug. 5, 1941. Paul P. O'Brien, Clerk.

